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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

CEDAR POINT OIL COMPANY,

Petitioner,

vs.

SIERRA CLUB, LONE STAR CHAPTER

Respondent.

On Petition For Writ of Certiorari To The Court of Appeals For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a Plaintiff has CONSTITUTIONAL STANDING to file a Citizen's Suit under the Clean Water Act (33 U.S.C. §1365(a)(1)) where such Plaintiff is "concerned", and "fears" that a discharge may impair his enjoyment of a waterway, but has suffered no "injury in fact".

2. Whether, upon the failure of EPA to perform its Congressionally mandated duties to issue discharge permits, and to develop applicable effluent limitations, a Plaintiff has statutory standing to file a Citizen's Suit where there has been no "violation of an effluent standard, permit or order".

3. Whether, in the above instance, a discharger is guilty of violating the Clean Water Act in the first instance by reason of discharge which violates no effluent standard, permit or order.

4. Whether, in the above instance, the federal courts are authorized to make the factual determination whether a discharger is "discharging a pollutant".

5. Whether, if the federal courts are authorized in EPA's stead to make the factual determination whether a discharger is "discharging a pollutant", they may do so summarily, without affording the discharger the opportunity to offer factual proof on such issue.

6. Whether it is an abuse of discretion for a court to strike all of a defendant discharger's expert testimony on the issue of pollution and harm in a Clean Water Act case, where the Plaintiff filed no Motion to Compel; and where the discharger made a good faith effort to comply with a local accelerated discovery rule requiring simultaneous

disclosure of expert testimony, informed counsel opposite and the Court in advance of his inability to do so, applied to the Court in advance for relief from such rule through traditional discovery, and provided all available information available in rebuttal.

7. Whether it is proper for a Court to assess a penalty based entirely and verbatim upon one party's pre-trial memorandum, and upon evidence which was discussed in such memorandum but never presented to the Court.

8. Whether attorney fees incurred on appeal are allowable under 33 U.S.C. 1365(d).

LIST OF PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVERSED

All Parties appear in the caption of the case.

Cedar Point Oil Company has no parent companies or nonwholly owned subsidiaries.

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STATEMENT OF JURISDICTIONAL GROUNDS AND REFERENCE TO OFFICIAL REPORTS OF OPINIONS

1. The U. S. District Court for the Southern District of Texas rendered a final decision in this case on May 27, 1994. District Courts have jurisdiction over Citizen's Suits under 33 U.S.C. §1365(a). The U. S. Courts of Appeal have appellate jurisdiction over appeals from final orders of District Courts pursuant to 28 U.S.C. §1291. Appellant filed a Notice of Appeal on June 20, 1994, and an Amended Notice of Appeal on July 5, 1994.

2. The U. S. Fifth Circuit Court of Appeals rendered its opinion (73 F.3d 546 (1996)) on January 11, 1996, affirming the judgment of the U. S. District Court for the Southern District of Texas, which final order disposes of all claims with respect to all parties.

3. The U. S. Fifth Circuit Court of Appeals entered an order denying Cedar Point Oil Company's Petition for Re-hearing on February 12, 1996, and entered an order granting in part Sierra Club's Motion for attorney fees and costs on February 14, 1996.

4. Jurisdiction is conferred upon this Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

STATUTES:

33 U.S.C.§1311(a); 33 U.S.C. §1314(b);
33 U.S.C.§1362(6)&(19); 33 U.S.C. §1365(a)&(d)

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40 C.F.R. §435.42
57 Fed.Reg. 60,926 (12/22/92)
60 Fed.Reg. 2387 (1/9/95)

No. __________

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STATEMENT OF THE CASE

1. **Course of proceedings and disposition in Court below.** This is an appeal from the decision of the Fifth Circuit Court of Appeals affirming a decision of the District Court for the Southern District of Texas granting Summary Judgment in favor of Sierra Club on a Citizen's Suit under the Clean Water Act (33 U.S.C. §1365(a)(1)), and assessing penalties and attorney fees against Cedar Point Oil Company.

2. **Statement of Facts.** Cedar Point Oil Company ("Cedar Point") operates an oil well in Galveston Bay. Oil is but a small part of the total fluid produced by an oil well. That fluid is for the most part salt water, brought to the surface from ancient, subterranean seas ("produced water"). After the oil is separated, the salt water must be disposed of. When Cedar Point's well was completed in 1991, Cedar Point did what every other operator in the Bay had done for the past sixty years. It applied to the Texas Railroad Commission and received a permit to discharge its produced

saltwater back into the sea.

Cedar Point is in a permitting vacuum -- a tiny crack between a number of bureaucratic agencies. The Clean Water Act ("CWA") first of all exempted from CWA regulations the vast majority of the on-shore oil and gas industry, when it specifically excluded from the statutory list of regulated discharges the sub-surface disposal of produced salt water (33 U.S.C. §1362(6)). Most water produced by on-shore facilities is disposed of by re-injection into underground reservoirs. The CWA allowed EPA to delegate the permitting of surface disposal to state agencies (33 U.S.C. §1342(b)). In Texas, such authority was delegated to the Texas Natural Resource Conservation Commission ("TNRCC"); but the TNRCC does not by State law administer to the oil and gas industry. Its rival agency, the Texas Railroad Commission does. So the TNRCC developed regulations for surface discharges by every industry around Galveston Bay except the oil and gas industry. Cedar Point's discharge is permittable under TNRCC regulations, but TNRCC does not have jurisdiction to issue the permit under State law. The Texas Railroad Commission does; but the Railroad Commission was never given authority ("primacy") by EPA to issue CWA National Pollutant Discharge Elimination System ("NPDES")permits. Therefore, EPA must do so directly only in the case of the oil and gas industry.

EPA was charged by Congress with the responsibility of administering the permit system under the Clean Water Act. The CWA envisioned that EPA, after study and input, would develop published limitations ("effluent limitations or standards") on the discharge of virtually everything known to man; and that permits to discharge would be granted or denied based upon those published standards (33 U.S.C. §1314).[1] The CWA directs EPA to develop these guidelines in three increasingly stringent stages for each of the various industrial categories of discharges (33 U.S.C. §1314). The oil and gas category is divided into three sub-categories. Surface disposal into Galveston Bay is in the "coastal" sub-category. On April 13, 1979, EPA adopted the first stage guidelines for the coastal sub-category (40 C.F.R. §435.42). Later stage guidelines were never adopted by EPA for the oil and gas industry (or for that matter for any industry), although they were required of EPA many years ago under Section 301 of the Act. The only effluent limitation placed upon coastal disposal of produced saltwater by the 1979 guidelines was a limitation upon the percentage of oil and grease contained in such water. EPA has completely defaulted in establishing the system of regulatory limitations envisioned by Congress.

EPA has never issued a single saltwater disposal permit for coastal disposal -- nor has it denied one; it simply has never chosen to be involved in the process in any fashion. EPA has historically abdicated responsibility to the Texas Railroad Commission in lieu of formally delegating the same. The Texas Railroad Commission issues all permits to coastal operators in Texas. Picking up the ball informally given to it, the Railroad Commission adopted the single EPA standard or limitation on oil and grease, and it became a part of Cedar Point's permit. Cedar Point reported the oil and grease content of its discharge to the Texas Railroad Commission as required, and it consistently stayed well below that effluent limitation.

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[1] In the absence of an established effluent limitation, a permit may be granted or denied on an individual basis according to the "best judgment" of the permitting authority [33 U.S.C. §1342 (a)(1) and 40 CFR §122.44(c)(2)].

When the Railroad Commission suggested to Bay operators that an EPA NPDES direct permit might be required in addition to the state permit, Cedar Point applied, in good faith, to the federal agency. Inexplicably, EPA expressly refused to act upon the application. We do not mean to say that EPA is slow in acting on the application; rather, EPA has communicated to Cedar Point that it will not rule on the application one way or the other; and to this day -- five years later -- it has not done so. EPA proposed instead a "general" permit for this type of disposal which would, in conjunction with a contemporaneous order, authorize disposal of produced saltwater into the Bay by all operators for a number of years (57 Fed.Reg. 60,926 (12/22/92)).

The Sierra Club, well aware of these circumstances, directed letters to the operators in the Bay and elsewhere along the Gulf Coast threatening them with Citizen's Suits under the Clean Water Act if they continued to discharge produced water without an EPA permit. Sierra offered an alternative -- an operator could continue to discharge; that is, continue to violate the Act in the Sierra Club's view, in exchange for a "contribution" to the private environmental community, plus payment of large attorney fees to the Sierra Club Legal Defense Fund. Cedar Point maintains that the Sierra Club, in effect, is issuing "citizens' permits" to discharge for monetary consideration. In February, 1993, Cedar Point applied to the U.S. District Court in Jackson, Mississippi, for an injunction: (1) requiring EPA to act one way or the other on Cedar Point's permit application -- as required by the CWA; and, (2) enjoining the Sierra Club from proceeding with its Citizen's Suit until EPA had so acted. The District Court in Mississippi ruled that Cedar Point could not prevent the Sierra Club from filing suit; but in three years it has still not ruled on the preliminary question whether EPA must perform its statutory duty and rule on Cedar Point's application.

In the meantime, the Sierra Club filed this suit against Cedar Point in Texas. The District Court granted Summary Judgment in favor of Sierra Club on the issue of liability. Proof was heard only regarding the amount of penalties. Prior to that hearing, Judge Hoyt struck all of Cedar Point's expert witnesses on the grounds that Cedar Point had failed to comply with the Court's local rules on accelerated discovery. Following the hearing, Judge Hoyt assessed a fine against Cedar Point of $186,070.00, awarded attorney fees of $82,956.86; and shut the well down. EPA thereafter adopted the "general" permit and compliance order under the terms of which all operators, including Cedar Point, were allowed to continue to discharge into the Bay for a period of two years. (60 Fed.Reg.2387 (1/9/95)

The Fifth Circuit Court of Appeals affirmed and assessed an additional attorney fee of $10,000.00.

ARGUMENT

I. CONSTITUTIONAL STANDING.

We lawyers have grown accustomed to arguing the abstract and ignoring the obvious. Some Sierra Club executive read some articles which questioned whether produced water discharges might represent a danger to the environment. The Sierra Club "litigation program" against Gulf Coast oil and gas operators was the product of that afternoon of reading. No member of the Sierra Club ever personally observed a problem resulting from produced water discharges and complained about it. We all know that has never happened.

The law on standing requires that a Sierra Club member be actually injured, Sierra Club v. SCM Corp., 747 Fed. 99 (2d Cir. 1984), and that the injury be "fairly traceable" to Cedar Point's discharge, Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 70 (3d Cir. 1990), cert. denied, 498 U.S. 1109, 111 S.Ct. 1018, 112 L.Ed.2d 1099 (1991). That is not the case here, but federal courts stretch logic to the breaking point in order to make the facts of cases such as this fit the rule of law, when the shoe very obviously does not fit. If the standing rules were enforced, few of the multitude of cases filed by organizations like Sierra Club would reach court. If the judiciary continues to bend rules to accommodate perceived public policy and its own bias, then the rules become meaningless.

In order to prop up an entirely too honest Complaint, Sierra Club presented three affidavits. Two of the affidavits -- however artful the wording -- merely expressed a "concern" that produced water discharges might harm the environment. "Concern" will not suffice. There must be actual injury. No one questions that an "injury to the senses" will suffice; but it is fundamentally necessary to standing that Mr. Douglas and Mr. Somers observe something which offended their senses. Neither affiant observed anything. The third affiant (Muhich) did. He observed oil and odor; but he failed to allege that the injury was traceable to Cedar Point's discharge, or to any produced water discharge. The affidavit failed to say where in the 220 square miles covered by Galveston Bay the oil and odor had been observed. Hundreds of industries discharge into the Bay. The affidavits utterly failed to establish Constitutional standing.

The Court of Appeals totally ignored the injury issue. It focused on the collateral discussion whether the affiants were "mere bystanders" -- a phrase commonly utilized in standing opinions. All three affiants lived near the Bay, and/or utilized it recreationally; so the Court concluded that they were not "mere bystanders". They had a legitimate interest in the case. But the opinion stopped there, and never proceeded to the fundamental issue of injury, much less causation. The Court of Appeals likened the facts of this case to those in another Fifth Circuit case in which the Plaintiffs were held to be more than "mere bystanders" because they lived near wetlands which were being drained. But those Plaintiffs obviously suffered injury. The draining of the wetlands was the injury. That case is not analogous to this one on the issue of injury.

Even though they enjoyed a status greater than that of "mere bystanders" -- even though they had a legitimate interest -- they had to suffer actual injury to their senses while utilizing the Bay near Cedar Point's discharge. They had to see a dead bird while canoeing; or smell oil while swimming.

The closest the Court of Appeals came to addressing the injury requirement was the comment (p. 18) that the injury did not have to be suffered; it could be merely "threatened". But once again, that conclusion totally ignores the fact that the affiants had to first observe something in order to achieve standing -- if not a sustained injury, then at least a threatened injury. If the affiants were not bloodied with a bat, they at least had to observe the Defendant standing before them with a raised bat. Two of these affiants did not see anything; and the Court simply never addressed that fundamental shortcoming.

Since Mr. Muhich's affidavit makes no attempt to satisfy the second requirement of causation -- that the injury be "fairly traceable" to the discharge -- the Court of Appeals relied entirely on the affidavit of Mr. Douglas -- who observed nothing -- to satisfy the requirements of both injury and causation.

The Court of Appeals moved directly to the second standing requirement -- causation. The Court cited Powell Duffryn, supra, to the effect that it was not necessary to show that the injury was caused by this particular discharge. That is true, but how can the Court reach the issue of what caused an injury without establishing that an injury occurred in the first place? In Powell Duffryn, the

Plaintiff observed *brown water near* Powell Duffryn's discharge. That sufficed as an injury to his senses. What that Court held was that the Plaintiff need not prove that Powell Duffryn's discharge *in particular* caused the injury to his senses. He was only required to show that Powell Duffryn's discharge *was of the type that typically caused brown color*. We do not argue with that concept. But Mr. Douglas never observed brown color -- or anything else. The Court of Appeals simply skipped over the injury requirement.

In an attempt to apply the *Powell Duffryn* causation rule to this case to establish standing, the Court of Appeals reasoned that Sierra Club showed that Cedar Point's water was "typical" of produced water; and offered expert testimony to show that "typical" produced water could injure benthic organisms. There are several things wrong with this analysis. First of all, it is factually incorrect. The water identified by Sierra Club's expert as typical -- at the *penalty* hearing -- was *not* the water Cedar Point was discharging. It was water from the old Chevron facility.[2] Second, this is a *standing* issue. The standing issue was decided *long* before the penalty phase. Standing was decided summarily on the basis of the affidavits alone. *The affidavits did not address the composition of Cedar Point's water*. Finally, once again, the Court of Appeals skipped over the first part of the equation -- *injury to Mr. Douglas*. If Mr. Douglas's affidavit had alleged that he scuba dived; that he loved to observe benthic organisms near Cedar Point's well; and that something was killing them -- THEN, although he might not be able to establish that Cedar Point water in particular was killing the benthic organisms, it would have sufficed under Powell-Duffryn to prove that Cedar Point's water was "typical" produced water -- and that typical produced water was known to have killed benthic organisms. But Mr. Douglas never observed a dead benthic organism.[3]

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[2] The expert admitted this. Cedar Point could have put in the correct test results had the Court not struck all of its witnesses!

This goes to the heart of the standing question. Sierra Club read some articles which speculate that produced water discharges in locations other than Galveston Bay may injure benthic organisms. Were it not for standing requirements, Sierra Club could do what the Court of Appeals suggests. It could simply ask the Court, as an academic matter, to determine whether typical produced water damages the environment. Standing rules preclude presentation of academic questions to the Court. The Plaintiff must be actually injured in order to present the question. In this case, there was no such injury.

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[3] Even had Mr. Douglas observed a dead organism near Cedar Point's discharge, the typicality of Cedar Point water -- and the effect of typical produced water -- would had to have been established through another affidavit in order to achieve standing under Powell Duffryn. And even then, the Court could not have properly entered summary judgment on liability. The composition and effect of Cedar Point water are fact issues.

II. A STATUTORY SCHEME GONE MAD.

Congress did not statutorily confer standing upon a "citizen" to sue under 33 U.S.C. §1365(a)(1) to stop a discharge merely because it is unpermitted. EPA can sue to stop an unpermitted discharge which EPA believes to be harmful, but under 33 U.S.C. §1365(a)(1) a "citizen" can sue a discharger ONLY where there is a violation of an existing EPA effluent limitation, or permit. The statute is absolutely clear and unambiguous.

> §1365. Citizen suits
>
> (a) Authorization; jurisdiction. Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf --
>
> (1) against any person who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.

Although the plan was overly ambitious -- and totally unrealistic in its scope -- the logic was not flawed. Congress wanted EPA to make the initial determination whether a substance was a "pollutant" in a given situation -- and if so, to impose limits on the discharge of that substance in that situation. If a discharger violated the limitation developed by EPA, or otherwise violated the permit issued by EPA, a citizen could sue to stop the discharge. But Congress did not want every citizen to be able to sue to stop a discharge which the citizen thought was a pollutant under the circumstances. That was EPA's job.[4] It was that simple; but it didn't work.

The problem is, of course, that EPA never developed the effluent limitations. So special interest groups like the Sierra Club file thousands of suits seeking to prohibit discharges of substances which Sierra Club considers pollutants. It was never supposed to work that way. EPA's total failure to carry out the Congressional mandate gives rise to several important questions which we present by this appeal.

A. IS IT A SUBSTANTIVE VIOLATION OF CLEAN WATER ACT IN THE FIRST INSTANCE TO DISCHARGE A SUBSTANCE WHERE NO EFFLUENT LIMITATION HAS BEEN IMPOSED ON THE DISCHARGE OF SUCH SUBSTANCES BY EPA IN THAT SITUATION?

The District Court in the Northern District of Texas held that an unpermitted discharge did not violate the CWA if there was no effluent limitation on the discharge of that substance (U.S. v. GAF Corp., 389 F.Supp. 1379, 1386 (NDTX 1975)). The Court of Appeals dismissed that ruling in GAF as dicta which had been criticized by other opinions. The Fifth Circuit did not address the case which gave rise to GAF (Jones Falls Sewage System v. Train, 375 F.Supp. 1148 (DCMD 1974)). We believe that GAF and Jones Falls are good law. In all of the enthusiasm over protecting the environment, the judiciary has failed to protect the individual.

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[4] A "citizen" did have the right to sue EPA under 33 U.S.C. §1365(a)(2) to require EPA to adopt limitations and require EPA to stop unpermitted discharges alleged to be harmful.

It is undisputed that EPA adopted an effluent limitation on but one component of Cedar Point's water; and that Cedar Point has always complied with the same. Had EPA imposed limits on the discharge of other substances in Cedar Point's water, Cedar Point would have complied with those limitations as well. But EPA defaulted and gave Cedar Point no directives at all. Cedar Point developed an excellent purification system which, Cedar Point believes, renders its produced water harmless. These are not criminals. They are respected, successful businessmen. So the question here is, if Cedar Point's discharge violates no effluent limitations, is Cedar Point nonetheless breaking the law because the discharge is unpermitted? Underlying this question is a more fundamental, if theoretical Constitutional question.

Sierra Club believes that no one can discharge ANYTHING, AT ANY TIME without a permit -- that the right to discharge emanates from the government. Cedar Point believes that it has the Constitutional right to run its business as it sees fit unless the government determines that an action is harmful to the public, and prohibits the action. If it is illegal to discharge anything without a permit, then each of us violates the law each time we pour drinking water down the sink. Oh no, the Court must be saying, it is only illegal to discharge a "pollutant". But who says what is a pollutant, and what is not? That is the question which underlies this lawsuit. Congress directed EPA to give structure to the system -- and guidance to the individual -- by adopting public limitations of various discharges. In the void left by EPA, madness prevails.

B. DOES SIERRA CLUB HAVE SPECIFIC STATUTORY STANDING TO SUE UNDER THE CITIZEN SUIT PROVISIONS OF THE CLEAN WATER ACT WHERE THERE HAS BEEN NO ALLEGED VIOLATION OF AN EPA EFFLUENT LIMITATION OR PERMIT?

In both GAF AND Jones Falls, EPA -- rather than a "citizen" -- was the Plaintiff, so statutory standing under the Citizen Suit provisions was not an issue in those cases. If an unpermitted discharge is a violation of the act even though there is no effluent limitation or permit violation, we now question, can a "citizen" (vs. EPA) file suit under 33 U.S.C. §1365(a)(1) merely because a discharge is unpermitted? Clearly it cannot. Once again, the language of 33 U.S.C. §1365(a)(1) is absolutely clear and unambiguous -- a "citizen" can sue only where there is a violation of an effluent limitation or a permit violation. Sierra Club urged the Courts below to ignore the perfectly plain statutory language, and arrive at a result exactly opposite of stated Congressional intent through convolution.

(1) It is true, Sierra Club admitted, that 33 U.S.C. §1365(a)(1) allows a Citizen's Suit only where there has been a violation of an effluent limitation or permit.

(2) However, 33 U.S.C. §1365(f) defines effluent standard or limitation as "any unlawful act".

(3) It is an "unlawful act" to discharge a pollutant without a permit. Therefore, Sierra Club can sue to stop an unpermitted discharge, whether the discharge violates an effluent limitation or not.

The GAF Court rejected the identical argument. The Fifth Circuit -- once again, in the spirit of pragmatism, we assume -- accepted the argument. By this convoluted reasoning, the Court interpreted the statute to "mean" exactly the opposite of what it says. The problem lies in the last part of the equation. It is not an "unlawful act" to "discharge" without a permit -- it is not unlawful to "discharge" your drinking water down the sink -- it is rather an unlawful act to discharge a "pollutant" without a permit (33 U.S.C. §1311(a)). The last part of Sierra Club's equation either assumes that Cedar Point is discharging a pollutant, or worse, assumes that everything is a pollutant in every situation. Since we are inundated with news every day about the terrible effects of lead, asbestos, etc., everyone assumes that certain substances are pollutants -- in every situation -- in any amount -- without qualification. That simply is not true.

The first and perhaps most fundamental consideration is amount. Excessive amounts of lead are unquestionably harmful to human health; but our drinking water contains lead within established limits, and the body requires a certain amount of the mineral. Sierra Club believes (and Sierra Club is not alone) that it is sufficient to allege that Cedar Point's water contains lead; and that Cedar Point is therefore "discharging a pollutant" without a permit. If that were the case, then the water of Houston is guilty as well, because the drinking water in that city contains more lead than the trace amount found in Cedar Point's water. The very term "effluent limitation" concedes the fact that we can only limit the discharge of substances to non-hazardous levels; we humans do not yet have the technology to eliminate lead from the face of the earth, and we would be unwise to do so if we could.

The situation is almost as important as the amount -- the nature of the receiving water in relation to the discharge. Excessive amounts of salt water will pollute the Mississippi River; but the same amount of salt water will not pollute the Atlantic Ocean. Conversely, the discharge of large amounts of fresh drinking water into a confined area containing salt water could kill the salt water animals living in that area. This analysis requires reference to another statutory definition -- that of "pollution":

> The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
> 33 U.S.C. 1362(19)

The bottom line is this. If the impact of the discharge in a given situation is an adverse effect on the environment, then the discharge is a pollutant. But that analysis necessarily requires us to consider the amount of the substance relative to that which occurs naturally, the nature of the receiving water, etc. That was supposed to have been the function of EPA -- not Sierra Club, and not the Courts.

Before it limits discharge of a substance (through effluent or permit limitations) EPA makes a more fundamental determination. Congress gave only a vague, general definition to the term "pollutant" (33 U.S.C. §1362(6), and specifically left it to EPA to decide what is, or is not a pollutant in a given situation.

The Court noted in National Wildlife Federation v. Gorsuch, 693 Fed.2d 156, 178 (DC Cir. 1982) that, "Congress did not intend the term 'pollutant' to be all-inclusive". Congress rather intended that EPA would have the discretion to decide, "which 'pollutants' and sources of pollutants were to be regulated under the NPDES Program" (page 173). Congress intended that EPA would give specific meaning to the general statutory definition. The Court found ample authority in the Congressional Record to support that conclusion:

> In the administration of the Act, EPA will be required to establish numerous guidelines, standards and limitations....[T]he Act provides congressional guidance to the Administrator in as much detail as could be contrived. Virtually every action required of the Administrator by the Act, however, involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others." Id.at 149, 1972 Leg.Hist. 332, 1972 U.S. Code Cong. & Admin.News at 3826.
>
> Senator Muskie stated: Again, I do not get into the business of defining or applying these definitions to particular kinds of

> pollutants. That is an administrative decision to be made by the Administrator. 117 Cong.Rec. 38,838 (1971), 1972 Leg.Hist. 1347.

Senator Muskie said it all when he noted, "Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another." (supra) That is exactly the point. Whether or not something _pollutes_ depends on the situation. EPA may impose limitations on the amount of salt water which may be discharged into a _fresh water stream_; but allow such a discharge into the ocean. EPA may determine that salt water is a "pollutant" in the first instance, and not in the second. Whether a substance is a "pollutant" in a given situation depends on whether the substance occasions "pollution" -- or adversely affects the environment in _that situation_. This is a matter of _proof_. Someone has to have the exclusive authority to make these factual determinations -- the final word. Otherwise there can be no uniform standards. Congress intended that EPA would make those determinations.

In the latter regard, the determination is not based entirely on environmental considerations. Under an existing executive order, for example, EPA cannot impose limitations which would require industry expenditures of over 100 million dollars without weighing the economic impact against the environmental gain. As the Court is no doubt aware, Congress is presently considering legislation which will reduce that number to 25 million dollars. It will cost the oil and gas industry 500 million dollars to eliminate produced water discharges, and 100 million a year to operate alternate facilities. In the worst case scenario, the environmental impact of the discharges will be less than $100,000.00. EPA must -- and no doubt did -- consider this economic reality in determining its course of action -- or inaction in this case. Does the Court believe that Sierra Club would give weight to economic considerations if it were entrusted with making these discharge limitation decisions? Sierra Club recognizes only one side of the scale -- the environmental side. That is why Congress intended that EPA should make this decision -- not Sierra Club.

Of course, EPA did not develop effluent limitations as Congress intended. The Court of Appeals agreed with us (p. 26) that Congress intended to protect the American businessman from irresponsible litigation made possible by EPA's default. That is why Congress allowed the citizen to sue only where an effluent limitation or permit had been violated. But the Fifth Circuit reasoned that Congress only intended that the protection would extend until a specific deadline set out in the statute. It reasoned that when the length of EPA's default grew to 25 years, Congress could have enacted legislation to extend protection to the businessman had it so desired; and that Congress -- by its inaction -- must have intended that Sierra Club could file citizen suits in the absence of effluent limitations, even though statute specifically says otherwise. The Court of Appeals once again used pragmatic logic to avoid perfectly clear and unambiguous language.

We are also unimpressed by the fact that numerous other citizen suits have been entertained by the Courts which sought to enjoin discharges which were not the subject of effluent limitations or permits. None of the defendant dischargers in those cases asked the Court to address the question whether the plaintiff had statutory standing, as we do in this case.

The Fifth Circuit Court of Appeals held that Sierra Club had standing to file a citizen's suit. But since EPA has failed to develop effluent limitations; and since the Court of Appeals therefore had to premise standing on the "unlawful act" of discharging a pollutant without a permit; what the Fifth Circuit ruling has done, in effect, is put off resolution of the standing issue until it is factually determined whether the discharger is discharging a "pollutant". Once again, this is a matter of proof. Yet the Court of Appeals affirmed the District Court's summary resolution of the issue. That was clearly error, and it leads us to more questions. First, since EPA has not made that factual determination, who will?

C. DID CONGRESS INTEND THAT THE FEDERAL COURTS WOULD DETERMINE WHAT IS OR IS NOT A POLLUTANT IN A GIVEN SITUATION?

While we feel that the Court of Appeals arrived at that conclusion in a rather circuitous fashion, we frankly welcome the opportunity to put on proof in a court of law on the scientific issue whether this water is polluting anything. It is often difficult to get EPA to focus on such a specific question. The problem is, Cedar Point was not allowed to put on any proof, so the next obvious question is:

D. CAN THE FEDERAL COURTS SUMMARILY DETERMINE WHAT IS OR IS NOT A POLLUTANT, WITHOUT AFFORDING THE DISCHARGER THE OPPORTUNITY TO PUT ON ANY PROOF ON THE ISSUE, AND STILL AFFORD THE DISCHARGER DUE PROCESS?

The Fifth Circuit affirmed the District Court's summary adjudication that Cedar Point was discharging a pollutant. The Court's rulings in this regard are perhaps the most frightening in the opinion. The Court pointed out that the statutory list of pollutants (33 U.S.C. 1362(6)) contains some very broad terms such as "industrial waste"; and concluded that such term is vague enough to include produced water. Although the Court had earlier acknowledged that Congress intended for EPA to give more specific definition to the broad definitional terms set out in the statute within specific factual contexts, it nonetheless simply concluded that produced water was a "pollutant" without qualification because it could be plugged into the broad term "industrial waste".

If the Court will presume to do that which was originally delegated to EPA, then let it at least do what EPA was directed by Congress to do. Let it hear proof whether this water is a pollutant in this situation. For all the District Court knew, Cedar Point could have been discharging Perrier water. The District Court heard no proof on the issue. Remember, the expert testimony referred to in the Fifth Circuit opinion (Sierra Club's side only) was heard at the penalty stage. Long before that state, the District Court ruled summarily -- without explanation -- that Cedar Point's produced water was a pollutant. In affirming that ruling, the Court of Appeals -- in addition to relying upon the vagueness of the statutory term "industrial waste" -- made note of the fact that produced water injected underground was specifically excluded from the Congressional list of pollutants. It perversely reasoned that all other produced water must therefore be a pollutant. The Court of Appeals also noted that EPA had developed effluent limitations on disposal of produced water for "on shore" and "off shore" categories. If EPA considered produced water pollutants in those instances, the Court reasoned, it must consider the produced water to be a pollutant in the "coastal" context applicable to this case. The Court finally commented (as did the District Court) that two of the elements of Cedar Point's discharge were considered as toxic in regulations applicable to different discharges by different industries.

All of the Court's reasoning blatantly ignores the fact that in Congress' view, a substance may be a pollutant in one instance, and not in another. EPA was supposed to decide under what circumstances a substance was a pollutant. The fact that EPA considered produced water a pollutant when it is dumped on the ground does not mean that it is a pollutant when it is dumped back into the sea. Cedar Point should have been allowed to put on proof on the factual issue whether it was discharging a pollutant.

III. STRIKING OF CEDAR POINT'S EXPERTS.

As a technical matter, expert testimony on the issue of the harm, if any, occasioned by Cedar Point's discharge was relevant only to the extent that harm is a factor in determining the amount of penalty. The substantive issue whether Cedar Point was discharging a pollutant had already been decided summarily, without Cedar Point having been afforded the opportunity to offer a word of testimony on the subject. Since the District Court based the actual calculation of the amount of its penalty upon the economic benefit factor, rather than the extent of harm, the Court of Appeals reasoned that the striking of experts was not very significant. That logic is too simplistic. The District Court was predisposed to the notion that Cedar Point was harming the environment without ever hearing a word of proof on that subject. Although it did not enter into the actual mathematics of the penalty calculation, the District Court specifically found -- in the discussion of penalty -- that Cedar Point had occasioned harm. Cedar Point's only opportunity to demonstrate to the Court that its discharge was not harming anything came at the penalty stage. While it is not likely that the District Court would have reversed its summary ruling on the discharge of a pollutant issue, it is absurd to suggest that the Court would not have been significantly influenced, in arriving at the penalty amount, by a demonstration that Cedar Point was harming nothing.

The Court of Appeals dismissed as inapplicable the requirement of Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233 (5th

Cir. 1988) that the Court may not strike witnesses unless the aggrieved party first obtains an order compelling discovery. The Court of Appeals reasoned that in the context of Xanthas, the Court was obliged to first make it absolutely clear what was required of the offending party, whereas in the case at bar, the requirements of the accelerated discovery order were perfectly clear in the first instance. Without regard to whether we agree, the Court of Appeals ignores the substance and purpose of Xanthas. The purpose of the Motion and Order to Compel is to make absolutely sure that the attorney for the non-complying party does not have a justifiable good faith excuse for his non-compliance. If a lawyer is acting honestly and in good faith in discovery matters, it is simply inexcusable for a court to treat that party as Cedar Point was treated in this case.

The Court of Appeals conceded (p. 53) that the Advisory Committee recommended that local versions of the accelerated discovery rule (26) require that the Plaintiff make the initial expert disclosures, and that the Defendant be allowed to review the same and then respond.

> [I]n most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to that issue.

This is the traditional way. It is the only way which makes sense. The rule in Judge Hoyt's Court required that the parties make simultaneous disclosure of the detailed content of their experts offerings. Notice pleading in

Federal Court allows the plaintiff to sue with just minimal notice to a defendant of what he is alleged to have done wrong. Sierra Club's Complaint alleged that Cedar Point's discharging was causing harm -- period. At the time the subject disclosures were required of Cedar Point, the only thing Cedar Point had ever obtained from Sierra Club through initial disclosure was a reference list of published articles, some of which alleged that produced brine caused harm to the environment. The articles themselves were unclear as to what element of the discharge was alleged to cause harm. Some did point the finger at one substance; others at a totally different substance. Those offending substances were either not present at all in Cedar Point water, or were not present in amounts discussed in the articles. Some articles discussed harm to drinking water; some dealt with harm to benthic organisms; others, with harm to animals which do not even live in the Bay. None of the articles, for that matter, involved Galveston Bay. None of the materials discussed Cedar Point's water. Cedar Point had not the least idea how Sierra Club believed that anything in Cedar Point water was harming anything. Under the circumstances, how could Cedar Point have possibly disclosed what its experts were going to say? Cedar Point did not know itself!

It would be one thing to make an inadequate initial disclosure, and then dream up this justification after the Court struck Cedar Point's experts. But Cedar Point, knowing that what the Accelerated Discovery Order required was IMPOSSIBLE, told Sierra Club's attorney -- and the Court -- in advance, in writing, that it could not possibly comply. **Cedar Point even went so far as to file some interrogatories** well in advance of the due date of its initial expert disclosures asking Sierra Club to specify exactly how Cedar Point water was alleged to be harmful to the Bay. Judge Hoyt ruled that Sierra Club did not have to answer the interrogatories. Then he imposed the ultimate evidentiary sanction! All Cedar Point could do was disclose initially as best it could, then respond in rebuttal to Sierra Club's expert disclosures. Cedar Point confirmed its intention to proceed in that manner in advance to both Sierra Club's attorneys and the Court.

The Court of Appeals found that the rebuttal disclosures should have been made initially. To some extent that is true -- because Sierra Club's initial disclosures were no more than a regurgitation of the studies, and Cedar Point's experts for the most part argued in rebuttal that such studies were irrelevant to this case.[5] But Cedar Point could not have known in advance that Sierra Club's offering would be so lacking in substance. To the very limited extent that Sierra Club presented relevant, specific information in its initial offering, it did so for the first time. Cedar Point responded in rebuttal -- the first time it could do so -- only 21 days after its initial disclosure -- a full 69 days prior to trial! Sierra Club was not prejudiced in any way in its trial preparations.

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[5] To this day Sierra Club has offered no indication of how Cedar Point water is alleged to be harmful to the Bay. Sierra Club never had to put up, because the liability issue was adjudicated summarily.

Judge Hoyt's ruling on experts is the equivalent of a judicial mugging. In twenty-three years, this attorney has never seen anything even remotely as abusive. We are still simply flabbergasted.

IV. THE PENALTY COMPUTATION.

Case law sets out certain criteria for the Court to consider in arriving at the amount of penalty. The District Court weighed each factor, but it founded the actual mathematical calculation upon the economic benefit realized by Cedar Point as a result of the unauthorized discharge. The District Court opinion was a verbatim copy of Sierra Club's Pre-trial Memorandum. That memorandum was submitted prior to the District Court striking Cedar Point's experts, so the calculation of the penalty in the memorandum was based upon what Sierra Club maintained that one of Cedar Point's experts would say at the hearing. Sierra Club's version of what the witness would have said was *totally inaccurate*; but more significantly, THE WITNESS DID NOT TESTIFY! So the District Court based the penalty *entirely* upon the evidence which was never presented!

Sierra Club subsequently filed a Motion attempting to clean up the mess which suggested that what the District Court really meant to say was such and such. The District Court adopted Sierra Club's rationale -- that other obscure references in some studies offered by Sierra Club, and a regulation of which the Court took judicial notice *could have* generated a figure *in the neighborhood* of the very specific figure the District Court based on the non-existent witness's testimony.

The Court of Appeals ratification of such nonsense says more than we could ever say about the bias of the Courts against anyone who would dare take the unpopular side in environmental litigation. There was nothing this District Court could do to Cedar Point Oil Company which could possibly offend the Court of Appeals' notion of fair play.

V. ATTORNEY FEES.

The Court of Appeals awarded Sierra Club additional attorney fees incurred during the appeal as "costs" under 33 U.S.C. §1365(d). That statute authorized the District Court only to award attorney fees and costs to the party prevailing in that Court. There is no statutory authority or case precedent for an award of appellate attorney fees.

Moreover, even though the Court of Appeals rationalized the radical sanction of striking all of Cedar Point's witnesses on the grounds that Cedar Point did not fully comply with the rules, it totally ignored the fact that Sierra Club's application for an award of costs was filed out of time. Sierra Club was not required to comply with the rules; but Cedar Point was -- to an impossible degree.

CONCLUSION

Every operator in Galveston Bay -- including Cedar Point -- is discharging produced water into the Bay as we write this, with EPA's blessings. Nothing has changed. The other operators paid a small amount to the Sierra Club Legal Defense Fund. Cedar Point did not, and Cedar Point is bankrupt. In retrospect, it is still difficult for this attorney to believe -- much less understand --

the things that happened along the road that led us here.

No Sierra Club member has ever been injured by anything Cedar Point ever did, and everybody -- every party, every lawyer, every Judge connected with this case -- knows it. The Courts below stretched the rules on Constitutional standing to the breaking point so as to allow Sierra Club to present a purely academic question to the Court. The Courts below allowed Sierra Club to proceed under 33 U.S.C. §1365(a)(1) even though that statute specifically and unambiguously provides that a "citizen" may sue only to enjoin a "violation of an effluent limitation or permit". Both Courts utilized strained and convoluted logic to arrive at the conclusion that the subject statute actually "means" exactly the opposite of what it says. That logic is founded entirely on the conclusion that Cedar Point is "discharging a pollutant" without a permit. Yet -- in the void left by EPA's failure to define pollutant in the context of this case -- the Courts below determined that Cedar Point was discharging a pollutant summarily -- without ever hearing one word of proof from Cedar Point, or Sierra Club, on the composition of Cedar Point's water, or its effect on the environment! To this day, the Courts do not even know what Cedar Point water is, both opinions discussing the composition of Cedar Point water by reference to test results on someone else's water! The Court of Appeals rationalized the ultimate sanction of striking every one of Cedar Point's witnesses for failure to comply with a rule which cannot be complied with; yet it allowed Sierra Club to blatantly violate the rule on application for costs without so much as commenting on Sierra Club's error. The District Court arrived at a penalty by simply adopting verbatim a one sided version of the proof, and ended up thereby founding the penalty on evidence which it never heard; and the Court of Appeals saw nothing wrong with that! This is, as we said earlier, like a judicial mugging. We are still reeling; dizzy, confused by the seemingly endless sequence of unfriendly, outrageous rulings. Either we are truly paranoid, or our perception is correct that the rulings in this case are punishing -- retributional. Why? How did this happen?

We can only surmise. Environmentalism is the cause celebre of this generation. There is a pervasive, angry, bias against anyone who even appears to question the integrity or the motives of an organization which espouses that cause. Cedar Point has never wanted anything but the opportunity to prove that it is not polluting -- that it is not harming anything. The Courts bend over backwards to afford those charged with a crime the opportunity to prove their innocence. If this case is any indication, the day is not too distant when those charged with an environmental "crime" will be summarily shot.

The effluent limitation and permit system envisioned by the Clean Water Act does not exist. This Court has never addressed the many important questions which arise out of that chaotic void. This case presents the Court with that opportunity, and we pray that the Court will restore sense to it all, and right this judicial aberration.

CEDAR POINT OIL COMPANY

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20461

SIERRA CLUB, LONE STAR CHAPTER,
Plaintiff-Counter
Defendant-Appellee,

v.

CEDAR POINT OIL COMPANY,
Defendant-Counter
Claimant-Appellant.

No. 95-20227

SIERRA CLUB, LONE STAR CHAPTER,
Plaintiff-Counter
Defendant-Appellant,

v.

CEDAR POINT OIL COMPANY, INC.,
Defendant-Counter
Claimant-Appellee.

Appeals from the United States District
Court for the Southern District of Texas

Before REYNALDO G. GARZA, KING and HIGGINBOTHAM, Circuit Judges.

KING, Circuit Judge:

These consolidated appeals arise from an action brought by Sierra Club, Lone Star Chapter ("Sierra Club"), against Cedar Point Oil Company ("Cedar Point") under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. §1365. Sierra Club alleged that Cedar Point was violating the CWA by discharging produced water into Galveston Bay without a permit and sought civil penalties and an order enjoining the unpermitted discharge. Cedar Point counterclaimed for abuse of process. Before trial, the district court granted summary judgment in favor of Sierra Club on the issue of Cedar Point's liability under the CWA and dismissed Cedar Point's counterclaim. After a bench trial, the district court assessed a civil penalty of $186,070. Cedar Point appeals. The district court also enjoined the discharge of produced water from Cedar Point's oil and gas production operations without a permit; however, the court later modified this injunction to allow Cedar Point to continue the unpermitted discharge. Sierra Club appeals this modification. We affirm in all respects the judgment of the district court.

I. BACKGROUND

A. Facts

1. "Produced Water"

This lawsuit concerns the legality of the disposal of a by-product of the oil and gas production process: "produced water." Produced water originates as source water trapped in underground geological formations with oil and gas. When a well is drilled into a formation, the extraction of oil and gas also brings the water to the surface. During extraction, chemicals used in the drilling process become mixed with the water. The result is produced water.[1]

Part of the production process involves the separation of the produced water from the extracted oil and gas. After separation, the operator must dispose of the produced water. The available methods of disposal include reinjection into an underground reservoir, land disposal, evaporation, and discharge into surface waters. Produced water is the highest volume waste source in offshore oil and gas production operations.[2]

2. Cedar Point's Operations

Cedar Point is a Mississippi corporation that owns and operates an oil and gas well and associated facilities in the Cedar Point field

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[1] The Environmental Protection Agency has defined produced water as "water and particulate matter associated with oil and gas producing formations. Produced water includes small volumes of source water and treatment chemicals that return to the surface with the produced formation fluids and pass through the produced water treating systems currently used by many oil and gas operators." 57 Fed. Reg. 60,926, 60,951 (1992). For discussions of the origin and composition of produced water, see BP Exploration & Oil, Inc. v. U.S.E.P.A., 66 F.3d 784, 792 (6th Cir. 1995); Natural Resources Defense Council v. U.S.E.P.A., 863 F.2d 1420, 1425 (9th Cir. 1988); American Petroleum Inst. v. E.P.A., 661 F.2d 340, 343 (5th Cir. 1981).

[2] BP Exploration & Oil, 66 F.3d at 792; Natural Resources Defense Council v. U.S.E.P.A., 863 F.2d at 1425.

("the field"), which is located in Galveston Bay in Chambers County, Texas.[3] John McGowan ("McGowan"), Cedar Point's principal shareholder, purchased the field from Chevron Corporation ("Chevron") on July 1, 1989. At that time, the field contained twenty-two abandoned wells and three producing wells. McGowan shut down the producing wells approximately one month after he purchased the field. On January 1, 1991, McGowan transferred the field to Cedar Point.[4] Later that year, Cedar Point drilled its first well since acquiring the field: state well 1876.[5] Cedar Point began producing oil and gas from this well on September 10, 1991.

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[3] The field and associated facilities are Cedar Point's only assets. Cedar Point itself has no regular employees, but contracts for necessary services with McGowan Working Partners, a Mississippi partnership that conducts oil and gas operations in Louisiana, Mississippi, and Texas. While most of the contractors who do work for Cedar Point hold interests in McGowan Working Partners, the partnership is not a party to this action.

[4] This transfer is characterized as a "purchase" in some of the documents in the record on appeal; however, David Russell, Cedar Point's vice-president, testified that Cedar Point acquired the field from McGowan at no cost.

[5] At the time this action commenced, Cedar Point had apparently not drilled any other wells in the field.

Cedar Point began to discharge produced water into Galveston Bay at approximately the same time that it began production from state well 1876. This discharge continued through the trial of this action in May 1994, except that the discharge was temporarily suspended between April and August of 1992. Throughout this period, the average daily discharge ranged between 500 to 1200 barrels per day.[6] Cedar Point's produced water contained inter alia, barium, benzene, zinc, chlorides, sulfate, bicarbonate, ammonia, naphthalene, phenolic, radium, oil and grease. Cedar Point disposed of its produced water in the following manner: (1) the oil, gas and water mixture produced from state well 1876 was piped to a platform in Galveston Bay for the first phase of separation; (2) after the initial separation, the remaining mixture was then piped to shore where more oil was separated in a series of tanks; (3) the produced water was then transferred to settling pits so that some constituents could settle out of the water; and (4) the remaining produced water was drained out of the pits and discharged through a pipe over the bulkhead into Galveston Bay.[7]

3. The Permits

Between August 1971 and July 1989, Chevron discharged produced water from the onshore separating facility pursuant to a permit issued by the Texas Railroad Commission ("the Railroad Commission"). This permit set limitations only on the oil and grease content of the produced water that was being discharged. After McGowan purchased the field, the Railroad Commission transferred Chevron's Commission permit to McGowan. The letter from the Railroad Commission authorizing this transfer stated that a permit from the Environmental Protection Agency ("EPA") may be required for the discharge of produced water under the National Pollutant Discharge Elimination System ("NPDES"). David Russell ("Russell"), who reviewed the transferred permit for McGowan, testified that he did not read this sentence in the letter; however, he did review Chevron's files, which did not reveal any NPDES permit or NPDES permit application in the twenty-year period of Chevron's ownership of the field. Based on this review, Russell did not apply for a NPDES permit for McGowan at that time.

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[6] A barrel contains 42 gallons.

[7] Originally, the produced water had been discharged into a marsh near the shore facility. In modifying the separation system, Cedar Point changed the discharge point to Galveston Bay.

After McGowan transferred the field to Cedar Point in 1991, Russell commenced negotiations with the Railroad Commission to transfer McGowan's Commission permit to Cedar Point. This negotiation took several months, apparently because Cedar Point and the Railroad Commission disputed the terms of the Commission permit that Cedar Point would ultimately receive. Cedar Point finally obtained a Commission permit in September 1992, again establishing limitations only on the oil and grease content of the produced water that was being discharged.[8] According to Russell, while he was negotiating the terms of this permit, Railroad Commission employees informed him that oil and gas operators in Galveston Bay were being sued for discharging produced water into the bay without a NPDES permit. Also, the final Commission permit that Cedar Point received in September 1992 advised that a NPDES permit may be required for the discharge of produced water and that EPA was considering prohibiting such discharges. Accordingly, on October 15, 1992, Cedar Point applied to EPA for a NPDES permit for its produced water discharges.

By letter dated November 5, 1992, EPA informed Cedar Point that its application for a NPDES permit had been reviewed and determined to be administratively complete. Since this acknowledgment, however, EPA has failed to act on the application. On December 30, 1992, Russell submitted a request to EPA under the Freedom of Information Act ("FOIA"),[9] asking whether EPA had ever issued a permit for the discharge of produced water in Texas. On February 4, 1993, EPA responded that it had issued two such permits. The first permit was a general permit[10] that applied to oil and gas operators in the "Offshore Subcategory" in Louisiana and Texas and established limitations on the oil and grease content of discharged produced water.[11] The second permit was also a general permit that applied to oil and gas operators in the "Onshore Subcategory" in Louisiana, New Mexico, Oklahoma, and Texas; this permit established an absolute prohibition on the discharge of produced water by these entities.[12] Neither of these permits applied to Cedar Point because Cedar Point is in the

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[8] Because Cedar Point began discharging produced water into Galveston Bay in September 1991, it had been discharging without a Commission permit of its own for twelve months. Russell testified that he assumed that Cedar Point could discharge pursuant to McGowan's Commission permit pending the approval of Cedar Point's transfer application. Although Sierra Club apparently questioned the legal basis of this assumption at trial, the legality of Cedar Point's discharges under Texas law is not an issue in this lawsuit.

[9] 5 U.S.C. §552.

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[10] There are two types of NPDES permits: individual and general. Typically, EPA will promulgate a nationally uniform "effluent limitation" on the discharge of a particular pollutant and implement that limitation in the form of individual NPDES permits issued to entities discharging that pollutant. See 33 U.S.C. §§1311, 1342. Where EPA has not yet promulgated such an effluent limitation, however, it may regulate the discharge of pollutants by issuing a general NPDES permit that applies to a class of similar entities located in a particular geographical region. See Natural Resources Defense Council v. Costle, 568 F.2d 1369, 1380-82 (D.C. Cir. 1977); 40 C.F.R. §122.28.

[11] 46 Fed. Reg. 20,284 (1981).

[12] 56 Fed. Reg. 7698 (1991)

"Coastal Subcategory."[13] In fact, at that time the only regulation that EPA had promulgated that applied to the discharge of produced water by Coastal Subcategory operators was an effluent limitation on the oil and grease content of discharged produced water;[14] however, EPA had never implemented this limitation through a general permit or individual permits. As a result, none of Cedar Point's produced water discharges was authorized by a NPDES permit.

B. Procedural History

1. Cedar Point's Collateral Action.

By letter dated December 16, 1992, Sierra Club informed Cedar Point that the discharge of produced water without a NPDES permit violated the CWA and that Sierra Club planned to seek monetary penalties and an order enjoining Cedar Point's unpermitted discharges.[15] In response to this letter, Cedar Point filed an action against Sierra Club and EPA in the United States District Court for the Southern District of Mississippi. In its complaint, Cedar Point alleged, inter alia that Sierra Club had "threatened" Cedar Point with a citizen suit and, impliedly, that EPA and Sierra Club were conspiring to deprive Cedar Point of unspecified constitutional rights. Specifically, Cedar Point requested the district court to issue an order that: (1) required EPA to respond to Cedar Point's application for a NPDES permit; and, (3) enjoined Sierra Club from filing a citizen suit against Cedar point. On July 12, 1993, the district court dismissed Cedar Point's claims against Sierra Club.[16]

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[13] EPA has divided the category of "Oil and Gas Extraction Point Sources" into several subcategories for the purpose of regulating discharges: "Offshore," "Onshore," "Coastal," "Stripper," and "Agricultural and Wildlife Water Use." 40 C.F.R. §435. The "Coastal Subcategory" includes facilities engaged in oil and gas production, field exploration, drilling, and well completion and treatment in "any body of water landward of the territorial seas as defined in 40 C.F.R. §§435.31(e), 435.40.

[14] 40 C.F.R. §435.42.

[15] The CWA requires that a person bringing an action under the citizen suit provision send

2. Sierra Club's Citizen Suit

Sierra Club filed the present action against Cedar Point on April 20, 1993, in the United States District Court for the Southern District of Texas. In its complaint, Sierra Club prayed for: (1) a judgment declaring that Cedar Point's unpermitted discharges of

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an "intent to sue" letter to the EPA, the alleged violator, and the state in which the alleged violation occurs at least 60 days prior to the commencement of the action. 33 U.S.C. §1365(b)(1).

[16] The court apparently has not disposed of Cedar Point's claims against EPA. The last docket entry in the case indicates that the court held a hearing on EPA's motion to dismiss on September 19, 1994, "with written opinion to follow in about a week."

produced water into Galveston Bay violated the CWA; (2) a permanent injunction prohibiting future unpermitted discharges; and (3) penalties for past unpermitted discharges. The district court immediately entered an Order for Accelerated Discovery, requiring the parties to make certain disclosures without waiting for discovery requests. This order directed, inter alia, that the parties disclose at least ninety days prior to trial the expert testimony that they would offer at trial.

Cedar Point filed its answer and a counterclaim against Sierra Club on August 18, 1993. The counterclaim alleged that Sierra Club's lawsuits against Cedar Point and other oil and gas operators in the bay constituted an abuse of process. Cedar Point sought compensatory damages for the emotional distress suffered by its officers and directors and $10,000,000 in punitive damages. Sierra Club moved to dismiss this counterclaim. The district court ultimately entered an order granting Sierra Club's motion on the grounds that, because Sierra Club's citizen suit was not frivolous, it could not be the basis for a claim for abuse of process.

Sierra Club then filed a motion for partial summary judgment on the issue of Cedar Point's liability under the CWA. In response, Cedar Point filed a cross-motion for partial summary judgment on the issues of its liability, Sierra Club's ability to state a claim under the CWA, and Sierra Club's standing to sue. The district court entered an order granting Sierra Club's motion for partial summary judgment and denying Cedar Point's similar motion on the liability issue.

Specifically, the court found as a matter of law that Cedar Point had discharged pollutants without a NPDES permit in violation of the CWA. The court also denied Cedar Point's motion on the issue of Sierra Club's standing to sue. In this regard, the court found that the affidavits submitted by Sierra Club established that some of its members had suffered injuries in fact that were fairly traceable to Cedar Point's discharge of produced water, and therefore were sufficient to defeat a motion for summary judgment.

Sierra Club also filed a motion to strike Cedar Point's designation of experts that it would offer at trial. In this motion, Sierra Club alleged that Cedar Point had failed to comply with that part of the district court's discovery order requiring "written report[s] prepared and signed by the witness[es] which include[] a complete statement of all opinions to be expressed and the basis and the reasons therefor." Specifically, Sierra Club complained that the reports submitted by Cedar Point were so substantively inadequate that Sierra Club would be substantially prejudiced if the court allowed these witnesses to testify. The court granted Sierra Club's motion to strike Cedar Point's experts, finding that Cedar Point had failed to comply with its discovery order.

The issues of the penalties to be assessed against Cedar Point for its past violations and Sierra Club's request for injunctive relief were tried to the bench. The Court issued its opinion and judgment on May 27, 1994. First, the court imposed a civil penalty of $186,070 based on the economic benefit that accrued to

Cedar Point because of its failure to comply with the CWA -- i.e., the money it saved by not constructing a disposal system that would have resulted in zero discharge. Second, the court enjoined Cedar Point from discharging produced water from its operations at the field into Galveston Bay until it obtained a NPDES permit.[17] Finally, the court awarded Sierra Club $60,000 in attorneys' fees as the prevailing party in the litigation.[18] The court later increased this award to $82,956.86. Cedar Point timely filed its notice of appeal from this judgment as well as the court's pretrial rulings, including the dismissal of Cedar Point's counterclaim and the partial summary judgment on the issue of Cedar Point's liability under the CWA.

3. Amendment of the Injunction

On January 9, 1995, EPA published a final NPDES general permit covering the discharge of produced water by operators in the "Coastal Subcategory" in Louisiana and Texas, including Cedar Point.[19] This permit imposed, inter alia, an absolute prohibition on the discharge of produced water, effective February 8, 1995. Along with the permit, however, EPA issued an administrative compliance order that qualified somewhat this effective date.[20] The compliance order recognized that many operators would have to reinject their produced water in order to comply with the permit's "No Discharge" provision. Because existing reinjection well operators, state permitting authorities, and drilling contractors would probably be unable to meet the demand for reinjection occasioned by the terms of the permit, complete compliance by all covered operators would necessarily be delayed until well after the February 8 effective date. Accordingly, the order directed the permittees to "[c]omplete all activities necessary to attain full and continuance [sic] compliance with [the "No Discharge" requirement] as soon as possible, but in no case later than January 1, 1997;" however, this order only applied to operators covered by the permit who would be discharging produced water on the effective date of the permit, February 8, 1995.[21]

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[17] The court also imposed a penalty for each day Cedar Point violated the injunction after August 31, 1994.

[18] See 33 U.S.C. §1365(d).

[19] 60 Fed. Reg. 2387 (1995). A draft version of this permit had been published on December 22, 1992, five months before the trial in this action. 57 Fed. Reg. 60,926 (1992).

Cedar Point could not discharge produced water on February 8 because the district court's injunction order prevented it from doing so without penalty. Accordingly, on January 30, 1995, Cedar Point filed a motion to amend or supplement the court's final judgment to allow it to discharge produced water without penalty on the effective date of the permit and thereafter so that it could take advantage of the two-year "grace period." The district court granted this motion and amended its May 27, 1994, opinion to allow the requested discharge. Sierra Club timely filed a notice of appeal from the court's order amending the injunction.

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[20] 60 Fed. Reg. at 2393.

[21] The order also required covered operators to prepare a Compliance Plan. The order states that "[a] Compliance Plan shall include a description of the measures to be taken, along with a schedule to cease discharge of produced water to waters of the United States as expeditiously as possible."

II. DISCUSSION

A. Cedar Point's Appeal

In its appeal from the judgment of the district court, Cedar Point raises the following points of error: (1) Sierra Club lacks standing to bring this action; (2) Sierra Club has failed to state a claim under the citizen suit provision of the CWA; (3) Cedar Point's discharges of produced water into Galveston Bay do not violate the CWA; (4) the district court erred in striking Cedar Point's designation of experts and excluding their testimony; (5) the district court erred in calculating the amount of the penalty imposed and in awarding attorneys' fees to Sierra Club; and (6) the district court erred in dismissing Cedar Point's counterclaim for abuse of process. We address each these arguments in turn.

1. Standing

Cedar Point's first argument on appeal is that Sierra Club lacks standing to bring this citizen suit. Specifically, Cedar Point argues that Sierra Club members have not shown the requisite "injury in fact" nor have they demonstrated that the alleged injury is "fairly traceable" to Cedar Point's discharge. Rather, Cedar Point claims that the affidavits submitted by Sierra Club members showed only a concern over produced water discharges into Galveston Bay, but not an injury from those discharges, much less an injury traceable to Cedar Point's discharges in particular. We review a district court's holding on the issue of standing de novo.[22] MD II Entertainment,

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[22] It is unclear what the district court's rulings on Sierra Club's standing were, or indeed, whether the court held anything at all on this issue. Cedar Point had moved for partial summary judgment on the issues of statutory and constitutional standing. In denying this motion, the court did not comment on the statutory standing issue, and stated only that the affidavits submitted by Sierra Club's members were sufficient to defeat summary judgment as to constitutional standing. The effect of this ruling was to leave the standing issues to be tried, and indeed, one of Sierra Club's affiants did testify at trial as a fact witness on the issue of constitutional standing. In its Memorandum Opinion, however, the court stated that it had "specifically held that Sierra Club had standing to pursue enforcement of this Clean Water Act claim" in its Partial Summary Judgment Order. Therefore, it is questionable whether the district court ever actually ruled on the standing issues. Nevertheless, because our review is de novo, this discrepancy does not affect our treatment of the issues. In addition, standing is a jurisdictional requirement, and may always be addressed for the first time on appeal. In re Taxable Mun. Bond Sec. Litig., 51 F.3d 518, 521

Inc. v. City of Dallas, 28 F.3d 492, 497 (5th Cir. 1994); United States v. $38,570 U.S. Currency, 950 F.2d 1108, 1111 (5th Cir. 1992).

An organization such as Sierra Club has standing to bring an action on behalf of its members where: (1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977); National Treasury Employees Union v. U.S. Dep't of Treasury, 25 F.3d 237, 241 (5th Cir. 1994); Save Our Community v. U.S.E.P.A., 971 F.2d 1155, 1160 (5th Cir. 1992). The parties do not dispute that Sierra Club satisfies the second and third prongs of this test. Rather, it is the standing of individual members of Sierra Club that is at issue.

In order to establish individual standing, a person must show that: (1) he has suffered an actual or threatened injury as a result of the actions of the defendant; (2) the injury is "fairly traceable" to the defendant's actions; and (3) the injury will likely be redressed if he prevails in his lawsuit. Save Our Community, 971 F.2d at 1160 (quoting Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982)). There is no question that an injunction would redress the injuries allegedly suffered by Sierra Club members who visit and

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(5th Cir. 1995).

recreate in Galveston Bay. Therefore, we focus on the "injury in fact" and "fairly traceable" requirements.

a. "Injury in Fact"

Sierra Club submitted affidavits from three of its members in response to Cedar Point's standing challenge. These affiants described how they use Galveston Bay for various recreational activities, including swimming, canoeing, and bird watching. Also, two of the affiants commented that they live near the Bay. With respect to produced water, each affiant made the following statement:

> I am familiar with "produced water" that is being discharged into Galveston Bay by oil and gas production facilities located on the Bay. I am concerned that the discharge of produced water adversely affects the water quality and the wildlife of the Bay. Therefore, I am concerned that the continued discharge of produced water will impair my ability to enjoy the activities in which I participate.

Only one of the affiants, Tommy Douglas ("Douglas"), indicated that he had participated in activities in the vicinity of Cedar Point's discharge. None of the affiants stated that Cedar Point's produced water in particular had impaired or threatened to impair his use of the Bay.

Cedar Point makes much of the fact that the affiants expressed "concern" that the discharge of produced water will impair their ability to engage in recreational activities.

Such language, Cedar Point argues, stated only an interest in eliminating produced water discharges into Galveston Bay, and not an injury in fact. We find no merit in this contention. Whether the affiants were "concerned" or "believed" or "knew to a moral certainty" that produced water would adversely affect their activities on the Bay is a semantic distinction that makes little difference in the standing analysis. The requirement that a party demonstrate an injury in fact is designed to limit access to the courts to those "who have a direct stake in the outcome," Valley Forge Christian College, 454 U.S. at 473 (quoting Sierra Club v. Morton, 405 U.S. 727, 740 (1972)), as opposed to those who "would convert the judicial process into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" Id. (quoting United States v. SCRAP, 412 U.S. 669, 687 (1973)) Sierra Club's affiants are concerned, but they are not mere "bystanders." Two of the affiants live near Galveston Bay and all of them use the Bay for recreational activities. All of the affiants expressed fear that the discharge of produced water will impair their enjoyment of these activities because these activities are dependent upon good water quality. Clearly, Sierra Club's affiants have a "direct stake" in the outcome of this lawsuit.

That this injury is couched in terms of future impairment rather than past impairment is of no moment. The Supreme Court has expressly held that a "threatened injury" will satisfy the "injury in fact" requirement for standing. Id. at 472 (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)); see also Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109, 1113 & n.4 (4th Cir. 1988) (noting that affidavit establishing threat of future injury met Article III standing requirements), cert. denied, 491 U.S. 904 (1989). Also, at least one of the affiants did claim to have suffered a past injury; Mark Muhich ("Muhich") stated that, during a number of his bird watching trips in Galveston Bay, he had observed discolored water, oil, and grease, and had detected unpleasant odors; he also asserted that polluted water impaired his enjoyment of bird watching. The Third Circuit has held that this precise sort of injury satisfies the "injury in fact" requirement for standing. Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71 (3rd Cir. 1990) (finding sufficient injury where plaintiff organization submitted affidavit of member who stated that he was offended by brown color and bad odor of water body adjacent to park where he went bird watching), cert. denied, 498 U.S. 1109 (1991).

Moreover, we have held that affidavits similar to those submitted by Sierra Club were sufficient to satisfy the "injury in fact" requirement in a citizen's suit brought under the CWA. In Save Our Community, the plaintiff organization supported its standing argument with affidavits by some of its members who owned property or lived in the vicinity of the wetlands that were being drained by the defendant. These affiants stated that they enjoyed "the wildlife, aesthetics, open space, ecological and other values of the wetlands, . . . and [were] directly and beneficially interested in the continued protection, preservation, and the enhancement of these values." Id. at 1160-61. In holding that these affidavits demonstrated a constitutionally sufficient injury in fact, we noted that "harm to aesthetic, environmental, or recreational interests is sufficient to confer standing, provided that the party seeking review is among the injured." Id. at 1161 (citing Sierra Club v. Morton, 405 U.S. at 734-35). We also recognized that "[t]hese injuries need not be large, an identifiable trifle will suffice." Id. at 1161 (quoting Powell Duffryn, 913 F.2d at 71 (internal quotations omitted)). Given this low threshold requirement,[23] we hold that the affidavits submitted by Sierra Club are sufficient to satisfy the "injury in fact" prong of the test for standing.

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[23] CWA cases from other circuits corroborate our observation that the threshold for the injury requirement is fairly low. See, e.g., United States v. Metropolitan St. Louis Sewer Dist. (MSD), 883 F.2d 54, 56 (8th Cir. 1989)(finding sufficient injury where complaint alleged that defendant had discharged pollutants into Mississippi River without a permit, that many of the intervenor organization's members used the river for recreational purposes, and that pollution of the water adversely affected this recreational interest); Simkins Indus., 847 F.2d at 1112 n.3 & 1113 (finding sufficient injury where the affidavit of a single group member who regularly hiked along river alleged that defendant's activities adversely affected his activities and interests); Friends of the Earth v. Consolidated Rail Corp., 768 F.2d 57, 61 (2nd Cir. 1985) (finding sufficient injury

b. "Fairly Traceable"

Cedar Point further argues that, even if the affidavits submitted by Sierra Club do establish an injury, they do not establish that the injury is fairly traceable to Cedar Point's discharge of produced water. In this regard, Cedar Point focuses on the affidavits of Douglas and Muhich. Cedar Point notes that Douglas, the only affiant who stated that he engaged in activity in the vicinity of Cedar Point's discharge, failed to assert that Cedar Point's produced water in particular injured him in any way. Cedar Point also notes that Muhich, the only affiant who claimed to observe discolored water and foul odors, did not allege that he made these observations in that part of Galveston Bay near Cedar Point's discharge. Accordingly, Cedar Point urges that Sierra Club has not met the "fairly traceable" requirement of standing.

The Third Circuit has articulated a three-part test for establishing that an injury is "fairly traceable" to a defendant's discharge in a citizen suit under the CWA. Powell Duffryn, 913 F.2d at 72. According to this test, the plaintiff must "show[] that a defendant has (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be

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where organization submitted affidavit of member who regularly drove on bridge over river and was offended by pollution in the river).

adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." Id. While an overly broad application of this test may be problematic, see infra n.24, its application to this case is useful.

Applying this test to Douglas, we find that Sierra Club has established that his injury is fairly traceable to Cedar Point's discharge. First, because Cedar Point does not even have a permit for its discharges of produced water, any discharge exceeds that which is allowed under the CWA. Second, Douglas asserted in his affidavit and testified that he has canoed and participated in educational trips in the vicinity of Cedar Point's discharge, and that he intends to continue these activities in this area in the future. These assertions establish Douglas's interest in that part of Galveston Bay around Cedar Point's discharge. With respect to whether produced water does or may adversely affect Galveston Bay, Sierra Club presented expert testimony that Cedar Point's produced water was typical in many respects, and that typical produced water has harmful effects on water quality and marine life.

Finally, produced water contributes to the types of injuries alleged by Douglas, including his fear that the harmful effects on water quality and the ecosystem will impair his ability to enjoy canoeing and observing wildlife. Contrary to Cedar Point's suggestion, the Constitution does not require Sierra Club to produce an affiant who claims that Cedar Point's discharge in particular injured him in some way. We have noted that "the fairly traceable element does not require that the plaintiffs 'show to a scientific certainty that [the] defendant's effluent, and [the] defendant's effluent alone, caused the precise harm suffered by the plaintiffs.'" Save Our Community, 971 F.2d at 1161 (quoting Powell Duffryn, 913 F.2d at 72). Given the number of entities discharging chemicals into Galveston Bay, it would be virtually impossible for any of Sierra Club's members to trace his injuries to Cedar Point's discharge in particular. Rather, it is sufficient for Sierra Club to show that Cedar Point's discharge of produced water contributes to the pollution that impairs Douglas's use of the Bay. See Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 980 (4th Cir. 1992); Powell Duffryn, 913 F.2d at 72 n.8. Therefore, we hold that Sierra Club has, by Douglas's affidavit, met the "fairly traceable" requirement for standing.[24]

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[24] Because we hold that Douglas's affidavit establishes an injury in fact that is fairly traceable to Cedar Point's discharge, we need not decide whether Sierra Club's other affiants also meet the "fairly traceable" requirement. See, e.g., Simkins Indus., 847 F.2d at 1113 (4th Cir. 1988) (finding organizational standing where one member's affidavit established individual standing), cited with approval in Save Our Community, 971 F.2d at 1161.

We note, however, that Douglas was the only affiant who expressed an interest in that part of Galveston Bay where Cedar Point's discharge is located. It is true that a strict

2. Stating a Claim Under the CWA

Cedar Point also contends that Sierra Club

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application of the Powell Duffryn test does not demand that sort of specificity, because the plaintiff need only show an interest in the "waterway" into which the defendant is discharging a pollutant; nevertheless, such literal reading of Powell Duffryn may produce results incongruous with our usual understanding of the Article III standing requirements. For example, some "waterways" covered by the CWA may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus in order to satisfy the "fairly traceable" element of standing. Cf. Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990) (holding that an affidavit alleging general use of a two million-acre land area was not specific enough to preclude summary judgment on the issue of statutory standing where the challenged action affected only 4500 of the two million acres); National Resources Defense Council, Inc. v. Watkins, 954 F.2d at 979 (4th Cir. 1992) (reversing district court's finding of no standing in a CWA case where affiants alleged use of river near the discharge site because the affidavits did not require the court "to assume any particularized geographic usage by the affiants to establish the injury necessary to confer standing"). Therefore, while we find the Powell Duffryn test useful for analyzing whether Douglas's affidavit meets the "fairly traceable" requirement, we recognize that it may not be an appropriate standard in other CWA cases.

has failed to state a claim under the citizen suit provision of the CWA because Sierra Club has not alleged that Cedar Point is violating an effluent limitation or permit provision promulgated by EPA.[25] We review the issue of whether a plaintiff has stated a claim under the same standard used by the district court: A claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitled him to relief. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Carney v. RTC, 19 F.3d 950, 954 (5th Cir. 1994).

As authority for its position, Cedar Point cites to the following language from our decision in Save Our Community v. U.S.E.P.A., 971 F.2d 1155 (5th Cir. 1992) (per curiam):

> Without the violation of either (1) an effluent standard or limitation under the CWA, or (2) an order issued with respect to these standards and limitations, the

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[25] The parties sometimes mistakenly refer to this issue as "statutory standing." The thrust of Cedar Point's argument, however, is that Sierra Club has failed to state a claim under the citizen suit provision of the CWA. "Statutory standing" is an administrative law concept that arises in the context of challenges to agency actions in which a court must determine whether the interest sought to be protected is within the "zone of interests" protected by the relevant statute. See Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153-54 (1970).

> district court lacks jurisdiction to act.

Id. at 1162. With respect to the constituents of Cedar Point's produced water, EPA has only promulgated an effluent limitation on the oil and grease content.[26] Because Cedar Point's discharges have always complied with this limitation, Cedar Point argues that Sierra Club has failed to state a claim.

Also, Cedar Point contends that Sierra Club has failed to state a claim with respect to the discharges of the other constituents of Cedar Point's produced water separately or for the discharge of produced water as a whole because EPA has not established an applicable effluent limitation or permit for those discharges. Cedar Point reasons that, because there is no effluent limitation or permit in place for these discharges, there can be no violation of a limitation, as required by Save Our Community. In support of this contention, Cedar Point notes that the Southern District of Texas has held that the discharge of a pollutant without a permit is not unlawful under the CWA unless EPA has adopted a relevant effluent standard or permit limitation. United States v. GAF Corp., 389 F. Supp. 1379, 1386 (S.D. Tex. 1975). Cedar Point emphatically asserts that this interpretation represents the way that Congress intended the CWA to work.

We find Cedar Point's arguments to be without merit. First, Cedar Point urges a result contrary to the plain language of the CWA. As we noted in Save Our Community, the citizen suit provision of the CWA states that:

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[26] 40 C.F.R. §435.42.

> [A]ny citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .

33 U.S.C. §1365(a)(1). The term "effluent standard or limitation," however, is expanded in a later subsection:

> For purposes of this section, the term "effluent standard or limitation under this chapter means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title . . . .

33 U.S.C. §1365(f). Section 1311(a) provides:

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. §1311(a). Among those sections listed for which compliance is necessary to make the discharge of a pollutant lawful, §1342 provides for NPDES permits that regulate the discharge of pollutants. Therefore, the discharge of any pollutant without a NPDES permit is an unlawful act under §1311(a). The Supreme Court has interpreted §1311 and §1342 in this way. City of Milwaukee v. Illinois, 451 U.S. 304, 310-11 (1981) ("[I]t is illegal to discharge pollutants into the Nation's

waters except pursuant to a permit."). Reading these sections together with §1365(a) and (f), it is clear that a citizen may bring an action under the CWA against any person who is allegedly discharging a pollutant without a NPDES permit.

We agree with Cedar Point that Congress initially intended that a citizen suit based on a violation of §1311(a) for discharging pollutants without a permit would only lie where EPA had issued a relevant effluent limitation or permit; that is, where the defendant was discharging pollutants without a permit because he had failed to obtain a permit that was available, rather than because EPA had failed to issue such permits. This intent is clearly established by the inclusion of particular dates in the statute, as explained by the legislative history.

First, the citizen suit provision states that a citizen may bring an action against a person allegedly committing an unlawful act under §1311(a) "effective July 1, 1973." 33 U.S.C. §1365(f)(1). The CWA was enacted on October 18, 1972. Federal Water Pollution Control Act Amendments of 1972, Pub. L No. 92-500, 86 Stat. 816 (1972). The legislative history expressly states that Congress delayed the availability of a citizen suit based on an allegedly unlawful act under §1311(a) in order to give EPA and the states time to issue all of the permits required by the CWA.[27] Of course,

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[27] Authority granted to citizens to bring enforcement actions under this section is limited to effluent standards or limitations established

EPA and the states have yet to achieve this ambitious goal. Nevertheless, Congress has not amended the statute to account for the fact that, since July 1, 1973, numerous entities have violated §1311(a) by discharging pollutants without a permit because EPA and the states have not issued the necessary permits.

In a similar vein, §1342(k) provides that:

> Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final

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> administratively under the Act. Such standards or limitations are defined in subsection (f) of [§1365] to include the enforcement of an unlawful discharge under [§1311(a)], effective after July 1, 1973. *By limiting the effective date of citizens suits for violation of this provision the Committee believes sufficient time is available for the State and Federal governments to develop fully, and execute the authority contained in [§1342, which provides for NPDES permits].*

S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971) (emphasis added).

> administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application.

33 U.S.C. §1342(k). Again, the purpose of this provision was to provide a "liability shield" to dischargers for a limited time so that they would not be exposed to legal action because of administrative delays in implementing the permit provisions of the CWA; apparently, Congress expected all permit applications to be processed by December 31, 1974. For example, in the House debates on the conference report, Representative Clark commented:

> Section 402(k) states that until December 31, 1974, a discharge shall not be in violation of law if a permit has been applied for, and the applicant has furnished all information reasonably required or requested. Hopefully, the program will be in the hands of the States by December 31, 1974, and permits will be issued. But, if not, Congress may have to extend this date.

1 A Legislative History of the Water Pollution Control Act Amendments of 1972 274 (Environmental Policy Div., Congressional Research Serv. ed., 1973) (House consideration of the conference report) (emphasis added). As with §1365(f)(1), however, Congress has not extended the availability of this liability shield beyond its original expiration date, despite the fact that applications for permits

are continually filed and many remain pending.

The result of Congress's failure to extend these exceptions for cases of administrative delay or default is that, "[u]nless the Administrator issues an NPDES permit, 'the discharge of any pollutant by any person [is] unlawful [under §1311(a)].'" National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 165 (D.C. Cir. 1982); see also National Resources Defense Council, Inc. v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977) ("[T]he Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of [§1311]."). As stated previously, the CWA explicitly provides that a citizen may sue persons allegedly committing unlawful acts under §1311(a). 33 U.S.C. §1365(f)(1). Therefore, a citizen may bring an action against a person allegedly discharging a pollutant without a permit, even if the discharger's illegal behavior results from EPA's failure or refusal to issue the necessary permit.

This result is supported by Supreme Court precedent involving an analogous administrative default in the context of an environmental enforcement action. General Motors Corp. v. United States, 496 U.S. 530 (1990). General Motors involved a state implementation plan ("SIP") that regulated emissions from automobile painting operations under the Clean Air Act ("CAA"). Id. at 534. The original SIP required General Motors to comply fully with certain emission limits by December 31, 1985. Id. at 535. One day before this deadline passed, the state submitted to EPA a proposed revision of the SIP that would have extended the compliance deadline to summer 1987. Id. The CAA authorizes a state to propose a revised SIP and requires EPA to approve the revised SIP if it meets certain statutory requirements. Id. at 533. EPA did not act on the proposed SIP revision until September 4, 1988. Id. In the meantime, however, EPA filed an enforcement action against General Motors on August 17, 1987, alleging that General Motors violated the compliance deadline contained in the old SIP. Id.

On appeal, General Motors contended that EPA could not, on the one hand, bring an enforcement action for violation of the original compliance deadline, while at the same time unreasonably delay acting on a proposal to extend that deadline. Id. at 540. The Court rejected this argument:

> There is nothing in the statute that limits EPA's authority to enforce the [existing SIP] solely to those cases where EPA has not unreasonably delayed action on a proposed SIP revision. Moreover, we find it significant that Congress expressly enacted an enforcement bar elsewhere in the statute. See §113(d)(10); 42 U.S.C. §7413(d)(10) (1982 ed.) ("During the period of the order . . . no Federal enforcement action pursuant to this section and no action under section 304 of this Act shall be pursued against such owner . . . ."). The fact that Congress explicitly enacted an enforcement bar similar to the one proposed by petitioner in

> one section of the statute, but failed to do so in the section at issue in this case reinforces our refusal to import such a bar here.

Id. at 541 (citations omitted).

Our analysis of the citizen suit provisions of the CWA tracks the Court's reasoning in General Motors. Nothing in the CWA limits a citizen's right to bring an action against a person who is allegedly discharging a pollutant without a permit solely to those cases where EPA has promulgated an effluent limitation or issued a permit that covers the discharge. We note that Congress did explicitly enact limitations on citizen suits for the purpose of protecting putative defendants whose violations could be attributed to administrative delay in promulgating regulations; however, these limitations have expires by their own terms. 33 U.S.C. §§ 1342(k), 1365(f)(1). Further, although these limitations may have been based on unrealistic expectations regarding EPA's ability to carry out fully its statutory mandate, it is significant that Congress has not in twenty-three years amended these sections to conform to the realities of EPA's regulatory burden and the attendant administrative delay. Therefore, while Congress's original intent may have been to limit citizen suits based on unpermitted discharges to those instances where an applicable permit was available from the state or EPA, Congress's subsequent inaction evinces an intent to allow such citizen suits even where the discharger's failure to obtain a permit can be explained by administrative default.

We are also not convinced that other courts have qualified the right to sue a person allegedly discharging pollutants without a permit by limiting that right to situations where EPA has promulgated a relevant effluent limitation or permit. The only authority that Cedar Point can cite for this proposition is the district court opinion in GAF Corp., which we find to have little persuasive value. First, the language in GAF Corp. cited by Cedar Point is dicta. Also, GAF Corp. involved a suit for injunctive relief by the government, rather than a citizen suit for damages; the court may have found it inequitable to allow the government to sue when it had not promulgated regulations to guide the defendant's behavior. Yet, even with respect to actions brought by the government, this language in GAF Corp. has been criticized. In United States v. Frezzo Bros., Inc., 602 F.2d 1123 (3rd Cir. 1979), cert. denied, 444 U.S. 1074 (1980), the Third Circuit specifically rejected GAF Corp.'s interpretation of the CWA:

> We see nothing impermissible with allowing the Government to enforce the Act by invoking §1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting. Without this flexibility, numerous industries not yet considered as serious threats to the environment may escape administrative, civil, or criminal sanctions merely because the EPA has not established effluent limitations. Thus, dangerous pollutants could be continually

> injected into the water solely because the administrative process has not yet had the opportunity to fix specific effluent limitations. Such a result would be inconsistent with the policy of the Act.
>
> We do not believe, as did the court in GAF, that the permit procedure urged by the government is unduly burdensome on business.

Frezzo Bros., 602 F.2d at 1128.

Moreover, we have held that obtaining a permit is a requirement separate and distinct from the requirement that a discharger comply with any applicable effluent limitations. Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1060 n.3 (5th Cir. 1991). Indeed, numerous courts have allowed suits by citizens against persons allegedly discharging pollutants without a permit, despite the fact that the discharger was complying with applicable effluent limitations or that no applicable effluent limitation was in place. See, e.g., Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 117 (2nd Cir. 1994) cert. denied, 115 S. Ct. 1793 (1995); Carr, 931 F.2d at 1061; Menzel v. County Utils. Corp., 712 F.2d 91, 94 (4th Cir. 1983); Washington Wilderness Coalition vs. Hecla Min. Co., 870 F. Supp. 983, 986 (E.D.Wash. 1994); Hawaii's Thousand Friends, Life of the Land, Inc. vs. City and County of Honolulu, 806 F. Supp. 225, 230 (D. Hawaii 1992); Hudson River Fishermen's Ass'n v. County of Westchester, 686 F. Supp. 1044, 1050 (S.D.N.Y. 1988); O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 646 (E.D. Pa. 1981).

Finally, EPA itself, whose expertise in

enforcing the CWA is entitled to some deference,[28] has recognized that citizens have the right to sue "Coastal Subcategory" operators who are discharging produced water without a permit. 57 Fed. Reg. 60,926, 60,944-45 (1992). At the time EPA made this statement, it had never issued such permits and had only issued effluent limitations on the oil and grease content of produced water. Accordingly, we hold that Sierra Club has stated a claim under the citizen suit provision of the CWA.

3. Violation of the CWA

Cedar Point's third argument on appeal is that the district court erred in granting Sierra Club's motion for partial summary judgment on the issue of whether Cedar Point's discharges of produced water violated the CWA. We review the granting of summary judgment de novo, applying the same criteria used by the district court in the first instance. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). First, we consult the applicable law to ascertain the material factual issues. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). We then review the evidence bearing on those issues, viewing the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); FDIC v.

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[28] We generally give deference to an agency's interpretation of a statute that it administers. Kershaw v. Resolution Trust Corp., 987 F.2d 1206, 1208 (5th Cir. 1993).

Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), cert. denied, 114 S. Ct. 2673 (1994). Summary Judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Cedar Point maintains that the discharge of produced water without a permit does not violate the CWA because the statute only prohibits the discharge of a "pollutant," and, it argues, neither produced water nor any of its constituents is a pollutant within the meaning of the CWA. First, Cedar Point contends that its produced water and the components thereof are not pollutants "per se" because they are not specifically enumerated in the CWA's definition of "pollutant." That provision states:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning os section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil

> or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. §1362(6). Cedar Point then argues that courts may not expand this definition to include substances not explicitly listed, citing as authority National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982). In this opinion, the court noted its reservations about adding terms to the definition of pollutant because "Congress used restrictive phrasing -- '[t]he term "pollutant" means dredged spoil, [etc.]' -- rather than the looser phrase 'includes,' used elsewhere in the Act." Id. at 171-72. The Court elaborated that the use of the term "means" indicates an intent to exclude any meaning not expressly stated. Id. at 172 (citing Colautti v. Franklin, 439 U.S. 379, 392 n.10 (1979)).

Further, the court relied on the legislative history of the CWA in determining that "Congress did not intend the term 'pollutant' to be all inclusive." Id. at 173. The court pointed out that the purpose of listing specific items in the definition was "so that litigable issues are avoided over the question of whether the addition of a particular material is subject to control requirements." Id. (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 76 (1971) (internal quotation omitted)). Also, the court noted that earlier draft versions of the CWA used more inclusive phrasing: "The term 'pollutant' means, but is not limited to, dredged spoil, . . ., and industrial, municipal, agricultural, and other waste discharged into water." Id. (quoting H.R. 11,896, 92d Cong., 2d Sess. §502(6) (1972) (emphasis added)(internal quotation omitted) and citing S. 2770, 92d Cong., 1st Sess. §502(f) (1971)). The conference committee deleted the more inclusive phrases "but is not limited to" and "other waste," but offered no explanation for the change. Id. (citing S. Rep. No. 1236 (Conf. Rep.), 92d Cong., 2d Sess. 143-44 (1972)).

Cedar Point concedes that a discharged substance may still be subject to regulation under the CWA even though it is not specifically listed in the definition of pollutant; however, Cedar Point contends that only EPA, and not the courts, may make the determination that a "non-listed" substance is a pollutant. Again, Cedar Point relies principally on National Wildlife Fed'n v. Gorsuch. In its review of the legislative history of the CWA, the court found "strong signals" that Congress "entrusted EPA with at least some discretion over which 'pollutants' and sources of pollutants were to be regulated under the NPDES program." Id. at 173. First, the court recognized a general intent to give EPA "substantial discretion" in interpreting the CWA:

> In the administration of the Act, EPA will be required to establish

> numerous guidelines, standards and limitations . . . . [T]he Act provides Congressional guidance to the Administrator in as much detail as could be contrived. Virtually every action required of the Administrator by the Act, however, involves some degree of agency discretion, judgments involving a complex balancing of factors that include technological considerations, economic considerations, and others.

Id. at 173 (quoting S. Rep. No. 1236 (Conf. Rep.), 92d Cong., 2d Sess. 149 (1972)). The Court then quoted Senator Muskie's comments, made during a debate over the Senate version of the CWA, as evidence of a specific intent to give EPA discretion in defining what constitutes a pollutant:

> Again, I do not get into the business of defining or applying these definitions to particular kinds of pollutants. That is an administrative decision to be made by the Administrator. Sometimes a particular kind of matter if not a pollutant in one circumstance and not in another.

Id. at 173-74 (quoting 117 Cong. Rec. 38,838 (1971)).

Cedar Point argues that Senator Muskie's comments in particular make it clear that only EPA may define what constitutes a pollutant under the CWA. First, Cedar Point notes that the above language expressly commits the definitional question to the Administrator of the EPA. Also Cedar Point emphasizes Senator Muskie's statement that a substance may be a pollutant in some situations and not in others. Specifically, Cedar Point contends that whether a substance is a pollutant depends upon, *inter alia*, the quantity in which it is discharged, the characteristics of the receiving waters, and the proportion of the amount of the substance in the discharge to the amount that exists in nature. For example, a substance may be very harmful when discharged in large quantities into a fresh water stream, but may have no measurable effect when a smaller quantity is discharged into a salt water bay. EPA takes these factors into account when promulgating effluent limitations and issuing NPDES permits. Therefore, Cedar Point argues, EPA defines a substance as a pollutant by prohibiting its discharge at certain levels through an effluent limitation or a permit. Stated differently, if EPA has not regulated the discharge of a substance in an effluent limitation or a permit *applicable to that discharge*, that substance is not a pollutant *in the context of that discharge*. Accordingly, Cedar Point maintains that it is not discharging a pollutant in violation of the CWA because: (1) neither produced water nor any of its constituents is specifically listed under the CWA's definition of a pollutant; (2) EPA has not promulgated an effluent limitation or issued a permit that regulates Cedar Point's produced water or any of its constituents except oil and grease; and (3) Cedar Point has always complied with the effluent limitation on oil and grease.

Finally, Cedar Point advances a policy

argument for its position that a court may not determine that a discharged substance is a pollutant where the substance is not specifically listed in the CWA and is not regulated by a limitation or permit applicable to the discharge in question. Cedar Point argues that, if courts are allowed to make such decisions, chaos will result because courts will reach different results regarding what substances are pollutants and at what levels such substances may be discharged without causing harm to the environment.

An analysis of Cedar Point's arguments requires us to engage in a two-step inquiry. First, we must determine whether the CWA allows a court to find that a particular substance is a pollutant where it is not specifically listed under the CWA's definition of a pollutant and EPA has not promulgated an effluent limitation or permit regulating the discharge of the substance. If a court may make such a finding, we must then determine whether Cedar Point's produced water, or any of its constituents, is a pollutant under the CWA.

We begin our analysis with the statute itself.[29] When a litigant's rights turn on whether his conduct falls within the proscriptions of a statute containing terms of art, a court will naturally seek guidance on the meanings of those terms by reference to definitions provided in the statute. As stated above, the CWA defines the term "pollutant" as "meaning" a list of various items and "not meaning" a couple of discrete substances. 33 U.S.C. §1362(6). We do not disagree with the D.C. Circuit's assessment that the use of the word "means" manifests an intent to restrict the definition of pollutant to the terms listed. National Wildlife Fed'n v. Gorsuch, 693 F.2d at 172. As that court recognized, however, the breadth of many of the items in the list of "pollutants" tends to eviscerate any restrictive effect. See id. at 173 n.52. Characterizing the list as "haphazard," the court noted that it contains materials as specific as "'cellar dirt' (but not 'dirt' as such) and as general as 'industrial, municipal, and agricultural wastes.'" Id. at 174 n.56. It is scarcely disputable that many substances discharged into the waters of the United States could be characterized as "industrial waste," or even as "chemical waste," another listed material. Therefore, the statutory definition of pollutant at least appears to invite the inclusion of discharged substances that are not specifically listed into these broad categories. Otherwise, these terms would be meaningless; that it, there would be o such thing as "industrial waste" because any such discharge could always be described in more specific terms that are not listed in the statute.

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[29] "When courts interpret statutes, the initial inquiry is the language of the statute itself." Hightower v. Texas Hosp. Ass'n, 65 F.3d 443, 448 (5th Cir. 1995); see also Matter of Stone, 10 F.3d 285, 289 (5th Cir. 1994).

As the D.C. Circuit acknowledged, the legislative history of the CWA provides little guidance on how inclusive Congress intended the definition of pollutant to be. Id. at 173 n.52. For example, although Congress clearly stated that the rationale for listing pollutants was to avoid "litigable issues" over whether a particular material is subject to the statute, the inclusion in the list of such imprecise terms as "industrial, municipal, and agricultural waste" generates more litigable issues than it resolves. Id. Also, while the conference committee's elimination of the phrases "but not limited to" and "other waste" from the definition of pollutant may be interpreted as an attempt to limit the scope of the definition, the committee did not explain the change. Id. at 173. Further, we think that the retention of such broad terms in the definition suggests that the committee may have determined that the eliminated phrases were simply redundant. For instance, a list that includes "solid waste," "chemical wastes," "biological materials," "radioactive materials," and "industrial, municipal, and agricultural waste" hardly needs to be amplified by the phrase "other waste." Finally, the D.C. Circuit noted that the House Report is "of little help in determining how inclusive Congress meant the terms 'pollutant' to be" because it does not discuss particular terms within the definition. Id. at 173 n.52.

In addition, one commentator has suggested that the CWA's definition of pollutant is considerably inclusive:

> This laundry list of "bads" endorses an understanding of a pollutant as a "resource out of place." The congressional purpose was to identify expansively and anticipate all the physical "stuff" that could end up in the wrong place to the detriment of water quality. . . .

> Despite the absence of an indisputable catch-all (e.g., "any other waste whatever"), there is little doubt that the recitation of categories in the definition of "pollutant" is designed to be suggestive not exclusive. In the 1972 amendments, Congress meant to carry on the tradition of the Refuse Act, and that tradition was to construe the word "refuse" as condemning each and every variation of damage-inducing wastes that changing technologies could invent. This interpretation is endorsed by United States v. Hamel, [551 F.2d 107 (6th Cir. 1977),] which condemns a discharge of gasoline as within a generic understanding of "pollutant," rather than stretch the less inclusive "biological materials" to cover organically-based petroleum compounds.
>
> That the definition of "pollutant" is meant to leave out very little is confirmed by the statutory definition of "pollution," which means nothing less than the "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." [33 U.S.C. §1362(19).]

2 Williams H. Rodgers, Jr., Environmental Law: Air and Water 144 (1986).

Given these observations, it seems clear that, while the listing of a specific substance in the definition of pollutant may be significant,[30] the fact that a substance is not specifically included does not remove it from the coverage of the statute. The next question, then, is who makes the determination that a substance that is not listed fits into the definition. Cedar Point argues that only EPA may make such a determination to the exclusion of the courts.

As an initial matter, we note that only in rare circumstances will a court be called upon to decide in a citizen suit whether a particular substance is a pollutant. Typically, citizen suits are brought against persons who are violating effluent limitations or permits issued by EPA. In such cases, the question of whether the discharged substance is a pollutant is not in issue because EPA will have already made that determination through the effluent limitation or permit.[31] As our earlier discussion confirms, however, a citizen may also bring an action against a person that is discharging an alleged pollutant without a permit even where EPA has filed to issue a permit or promulgate an effluent limitation to cover the discharge. In these cases, EPA will necessarily have not made a determination that the discharged substance is a pollutant. Therefore, logic dictates that the court must be able to decide whether the discharged substance is a pollutant in order to determine whether the defendant is violating the statute. It would make little sense to allow a citizen to bring an action that the court could not adjudicate.[32] We find that this logic compels a holding that a court may determine in a citizen suit whether a discharged substance is a pollutant, notwithstanding the fact that EPA has failed to issue a permit or to promulgate an effluent limitation that regulates the discharge.

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[30] Indeed, if a person were to be so bold as to discharge "cellar dirt," he could hardly be heard to complain when the full force of the CWA was brought upon him.

[31] If the discharger disputed EPA's determination that a particular substance was a pollutant, its recourse would be to seek judicial review of he determination. In such a case, the court would not be deciding whether a particular substance was a pollutant, but rather whether EPA's determination was a reasonable interpretation of the statute. See, e.g., National Wildlife Fed'n v. Gorsuch, 693 F.2d at 174 n.56.

Cedar Point does not direct us to any

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[32] This logical flaw could be avoided by characterizing the question of whether a substance is a pollutant as part of stating a claim; that is, by requiring the citizen to demonstrate as an element of his claim that the defendant is discharging a pollutant. Such a characterization is plausible, given that the issue of stating a claim is somewhat intertwined with the question of whether there has been a substantive violation of the CWA. Even under this reading, however, a court would still have to decide whether a substance being discharged was a pollutant in citizen suits where EPA had not issued a permit or effluent limitation.

statutory authority to the contrary. First, we note that neither the statute nor the legislative history expressly grants EPA the exclusive authority to decide that a substance falls within the statutory definition of pollutant or divests the courts of the same. The D.C. Circuit has interpreted the legislative history of the CWA to mean that Congress has invested EPA with "at least some power" to define the term "pollutant," National Wildlife Fed'n v. Gorsuch, 693 F.2d at 167. While we agree with this assessment, we find no support for the logical leap that this delegation of power necessarily deprives the federal courts of similar authority where EPA has not spoken. It is true that Congress intended EPA to apply the definition of pollutant to particular substances and to regulate those substances through effluent standards and permits. Nevertheless, as explained in our discussion regarding stating a claim, Congress also made it unlawful for a person to discharge a pollutant without a permit even where EPA has not applied the definition to the substance being discharged. In such a case, the courts must apply the definition.

Further, these rare cases where courts are called upon to determine whether a substance is a pollutant do not require a "complex balancing" of biological, technological and economic factors, such as EPA must undertake when promulgating effluent standards. That is, the court will not be asked to analyze the level of discharge, the character of the receiving waterway, and the cost of achieving various permit limitations. Rather, Congress has already set the permit limitation in such cases -- zero discharge. A court need only apply the statutory definition to determine if the substance in question is a pollutant. If it determines that the substance is a pollutant, and the defendant is discharging it at all without a permit, then there has been a violation of §1311(a). We do not think that this task is beyond the competence of a court.

Cedar Point also fails to direct us to any judicial authority contrary to our holding. In this regard, we point out that Cedar Point's reliance on National Wildlife Fed'n v. Gorsuch for this proposition is misplaced. The court's reservations regarding adding terms to the statute did not arise in the context of it being asked to add those terms. Rather, the court was reviewing a decision by EPA not to regulate through a permit the low dissolved oxygen, cold, and supersaturation caused by dams. Id. at 171. The court expressly stated that it was not deciding whether the definition of pollutant necessarily excluded those elements, but only whether EPA could so interpret the definition. Id. at 174 n.56.

Moreover, our holding breaks no new ground in the case law. Rather, it is consistent with numerous CWA cases in which courts have made an independent determination that a particular substance is a pollutant without reference to any applicable effluent standard or permit limitation. See, e.g., Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 117 (2nd Cir. 1994) (finding that liquid manure is a pollutant because definitional list includes solid waste, sewage, biological materials, and agricultural waste), cert denied, 115 S. Ct. 1793 (1995); United States v. Plaza Health Labs., Inc., 3 F.3d 643, 645 (2nd Cir. 1993) (finding that human blood is a pollutant because definitional list includes biological materials), cert. denied, 114 S. Ct. 2764 (1994); United States v. Schallom, 998 F.2d 196, 199 (4th Cir.) (finding that "shotcrete" and cement are pollutants because definitional list includes solid waste, chemical waste, and sand), cert. denied, 114 S. Ct. 277 (1993); National Wildlife Fed'n v. Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988) (finding that dead fish and fish remains are pollutants because definitional list includes biological materials); United States v. M.C.C. of Florida, Inc., 772 F.2d 1501, 1505-06 (11th Cir. 1985) (finding that redeposited vegetation and sediment are pollutants because definitional list includes dredges spoil), vacated and remanded on other grounds, 481 U.S. 1034 (1987); United States v. Hamel, 551 F.2d 107, 110 (6th Cir. 1977) (finding that gasoline is a pollutant because generic terms of definitional list evince congressional intent to encompass substances covered under the Refuse Act of 1899, and Supreme Court had held that gasoline was covered by the earlier statute); Higbee v. Starr, 598 F. Supp. 323, 330 (E.D. Ark. 1984) (finding that hog waste is a pollutant because definitional list includes agricultural waste), aff'd, 782 F.2d 1048 (8th Cir. 1985).[33] The fact that courts have been making these determinations since the enactment of the CWA tends to deflate Cedar Point's concerns that the exercise this authority will result in chaos.

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[33] We recognize that some of these cases are not completely analogous to the case sub judice because they involve civil or criminal enforcement actions brought by the government;

Having held that we have the authority in a citizen suit under the CWA to determine whether a discharged substance is a pollutant, we now turn to the question of whether Cedar Point's produced water, or any of its constituents, is a pollutant under the CWA. Examining the statutory definition of pollutant first, we think that produced water is clearly subsumed by phrases "chemical wastes" and "industrial waste." 33 U.S.C. §1362(6). The exclusions under this definition also provide some guidance. Specifically, the definition states that the term "pollutant" does not mean

> water derived in association with oil or gas production and disposed of in a well, if the well used . . . for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

33 U.S.C. §1362(6)(B).[34] Although this

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however, we see no reason why a court may determine that a substance is a pollutant in such cases but may not make that determination in a citizen suit.

[34] Inexplicably, neither party brought this provision to our attention. This failure is

exclusion of produced water from the meaning of pollutant in very limited circumstances does not necessarily mean that produced water is a pollutant under all other circumstances,[35] we

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all the more remarkable because this provision *is* the unmistakable fingerprint of the oil and gas industry on the CWA -- in the definition of "pollutant" no less.

[35] *But cf.* *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). In this case, U.S. Steel challenged EPA's authority to regulate its disposal of acid wastes in a well. *Id.* at 851. With respect to whether the acid wastes were a pollutant, the court quoted the exemption in §1362(6)(B) and stated:

> Applying the canon *expressio unius est exclusio alterius* to the quoted language, we conclude that the listed materials are "pollutants" when injected into wells under any other circumstances.

Id. at 852. We do not apply that canon here. The legislative history makes clear that Congress was distinguishing between the disposal of produced water into wells by the oil industries, rather than between the disposal of produced water into wells and the disposal of produced water by other means. 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* 589-97 (Environmental Policy Div., Congressional Research Serv. ed., (1973) (House debate on amendment offered by Rep. Aspin that would have nevertheless consider it a strong indicator of Congress's concern over the effects of produced water on the environment. Furthermore, if Congress felt that it was necessary to draft a detailed exemption for produced water that has been disposed of in a state-approved reinjection well, it may be that Congress believed that such produced water would otherwise be a pollutant. If, absent an exemption, produced water reinjected into a state-approved well is a pollutant, then it is hardly a stretch to say that produced water deposited directly into a bay is also a pollutant.[36]

Aside from this statutory support, we also find substantial guidance from EPA on the question of whether Cedar Point's produced water is a pollutant. As we noted in our discussion of stating a claim under the CWA, EPA has recognized that citizens have the right to sue "Coastal Subcategory" operators who are discharging produced water without a permit. 57 Fed. Reg. 60,926, 60,944-45 (1992). The ability to bring such an action necessarily implies that produced water is a pollutant. In addition, EPA has issued permits regulating produced water discharges by oil and gas operators in the "Onshore Subcategory" and the "Offshore Category" in Texas. 56 Fed. Reg.

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eliminated the exemption).

[36] We also think it significant that, although Congress provided this clear avenue for oil and gas producers to avoid regulation by the CWA, Cedar Point chose not to avail itself of it.

7698 (1991); 46 Fed. Reg. 20,284 (1981). In these permits, EPA has explicitly referred to produced water as a "pollutant." See, e.g., 56 Fed. Reg. 7698, 7701 (1991) ("[T]he permits prohibit the discharge of all wastewater pollutants from Onshore Subcategory facilities, including . . . produced water." (emphasis added)). Finally, several of the components of Cedar Point's produced water, including benzene, naphthalene, and zinc, are listed as "toxic pollutants" in regulations promulgated by EPA. 40 C.F.R. §401.15 (1994); cf. Daque v. City of Burlington, 732 F. Supp. 458, 469.70 (D. Vt. 1989) (finding substances discharged by defendants to be pollutants by reference to the toxic pollutant list). Similarly, oil and grease are listed as "conventional pollutants." 40 C.F.R. §401.16 (1994).

Given this support in the statute, as reinforced by EPA's own regulations, we conclude that Cedar Point's produced water is a pollutant within the meaning of the CWA.[37]

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[37] We recognize that the overwhelming evidence from the statute and the regulations makes our determination that produced water is a pollutant an easy one. We note, however, that the conditions that give rise to the need for a court to determine whether a substance is a pollutant may lead to more difficult cases. Where EPA has not promulgated a permit or limitation for a particular discharge, it may be because EPA lacks the resources to do so or because the discharge is not a priority. Occasionally, however, it may be because EPA questions whether the discharged substance is a pollutant at all. In such a case, it is

Cedar Point does not dispute that it discharged this produced water into Galveston Bay without a NPDES permit. Accordingly, we conclude that the district court correctly held that Cedar Point violated §1311(a) of the CWA.

4. Striking of Cedar Point's Experts

Cedar Point's fourth argument on appeal is that the district court erred in striking Cedar Point's designation of experts and excluding them from testifying at trial as a sanction for violating the court's accelerated discovery order. In this regard, we are asked to review two separate determinations by the district court: (1) whether Cedar Point actually violated the discovery order; and (2) if there was a violation, whether the striking of Cedar Point's experts was an appropriate sanction. We review the court's finding that Cedar Point violated the discovery order for an abuse of discretion. See Scott v. Monsanto Co., 868 F.2d 786, 793 (5th Cir. 1989) (district court's rulings on discovery matters will only be reversed for abuse of discretion). We apply the same standard in reviewing a sanction for violating a discovery order. Chilcutt vs. United States, 4 F.3d 1313, 1320 (5th Cir.

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likely that the substance may not clearly fit within the statutory definition and that there will be little regulatory guidance from EPA. In a citizen suit brought under these circumstances, courts should exercise restraint to avoid stretching the term "pollutant" too far.

1993), cert denied, 115 S. Ct. 460 (1994).[38] The district court's discretion in such matters has been described as "broad", id.; Landry v Air Line Pilots Ass'n Int'l AFL-CIO, 901 F.2d 404, 436 n.114 (5th Cir.), cert. denied, 498 U.S. 895 (1990), and "considerable", Murphy v. Magnolia Elec. Power Ass'n, 639 F.2d 232, 234 (5th Cir. 1981). Accordingly, "[i]t is unusual for an appellate court to find abuse of discretion in these matters." O'Malley v. United States Fidelity and Guar. Co., 776 F.2d 494, 499 (5th Cir. 1985). Generally, we will only reverse the trial court's discovery rulings in "unusual and exceptional case[s]." Id. (quoting Brown v. Thompson, 430 F.2d 1214, 1216 (5th Cir. 1970) (internal quotations omitted)).

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[38] But see Alldread v. City of Grenada, 988 F.2d 1425, 1436 (5th Cir. 1993). Alldread applied a "manifest error" standard in reviewing a trial court's exclusion of expert testimony s a sanction for failing to comply with a discovery order. As authority for this proposition, the Alldread court cited Page v. Barko Hydraulics, 673 F.2d 134, 139 (5th Cir. 1982). Page, however, involved an evidentiary ruling on the admissibility of an expert's testimony at trial. It is true that the exclusion of expert testimony as an evidentiary matter is reviewable for manifest error. United States v. Willey, 57 F.3d 1374, 1389 (5th Cir. 1995), cert. denied, 1995 WL 668887 (U.S. Dec. 11, 1995). When expert testimony is excluded as a sanction, however, we review the trial court's ruling for abuse of discretion. Chilcutt, 4 F.3d at 1320; Bradley v. United States, 866 F.2d 120, 124 (5th Cir. 1989).

Immediately after Sierra Club filed its complaint on April 20, 1993, the district court entered an order setting an accelerated discovery schedule for this case, rather than proceeding under a traditional discovery plan.[39] The order first required the parties to make certain "initial disclosures" without waiting for discovery requests. These initial disclosures were to include copies of "all documents, data compilations, and tangible things . . . that are likely to bear significantly on any claim or defense."

In addition to these disclosures, the court's order required the parties to make disclosures regarding the expert testimony that they intended to present at trial. With respect to each expert witness, each party had to submit to the other the following:

> a written report prepared and signed by the witness which includes a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of

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[39] The authority for such an order is found in paragraph 6 of the Cost and Delay Reduction Plan under the Civil Justice Reform Act of 1990, 28 U.S.C. §§471-482, as adopted by the Southern District of Texas on October 24, 1991. The order tracks the language of the new Rule 26(a) of the Federal Rules of Civil Procedure, with slight modifications.

> the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years.

The order required the parties to submit these reports ninety days prior to the trial date.[40]

The order appears to call for "simultaneous" disclosure of the reports; that is, the order did not direct one party to submit its reports first, but only required each party's reports to be submitted by the ninety-day deadline.[41]

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[40] In a telephone conference on September 29, 1993, the district court set this case for trial-docket call on May 2, 1994; accordingly, the expert disclosure deadline fell on February 1, 1994.

[41] The Advisory Committee Notes to Rule 26 recommend disclosure of these reports seriatim, but leave such a decision to the discretion of the trial court:

> [I]n most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other parties are required to make their disclosures with respect to the issue. In the absence of such a direction, the disclosures are to be made by all parties at least 90 days before the trial date or the date by which the case is to be ready for trial. . . .

After this deadline, the order allowed the parties to make additional expert submissions in only two situations. First, the parties could submit reports "to contradict or rebut evidence on the same subject matter identified by another party" in its initial expert disclosures. The order directed that such a report be made within thirty days after the disclosure of the report being rebutted. Second, the parties had a duty to supplement these reports if necessary.[42] Such supplementation was required to be made at least thirty days prior to trial.[43]

On January 24, 1994, Cedar Point filed a corrected designation of its expert witnesses:

Fed. R. Civ. P. 26 advisory committee's note.

[42] The scope of this duty to supplement is outlined in Rule 26(e). Specifically, a party is required to supplement its expert disclosures if the court so orders or if "the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1).

[43] Rule 26(e)(1) requires that supplementation of expert disclosures be made by the time the supplementing party's "Pretrial Disclosures" are due. Fed. R. Civ. P. 26(e)(1). The court's accelerated discovery order directed that the "Pretrial Disclosures" would be due at least thirty days before trial.

Don Harper, Carl Oppenheimer, John McGowan, and Stanley Pier. Two days later, Cedar Point supplemented this list with the designation of Joe Haney. Cedar Point served the required reports from these experts around the deadline set by the court's order.[44] Cedar Point later timely served Sierra Club with "rebuttal" expert reports from Don Harper, John McGowan, and Stanley Pier. Finally, Cedar Point timely supplemented Don Harper's reports before trial.[45]

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[44] Cedar Point maintains that its submission of expert reports was timely, citing as evidence a letter to the Clerk of the Southern District of Texas that was copied to counsel opposite. This letter was a cover letter to the expert reports and was dated February 2, 1994. The deadline for service of these reports, however, was February 1, 1994, ninety days before the docket-call date of May 2, 1994. The court's order directed that the parties serve the reports in accordance with Rule 5 of the Federal Rules of Civil Procedure. Assuming that Cedar Point mailed these reports to Sierra Club, it would have had to do so by February 1, as Rule 5 provides that service by mail is complete upon mailing. Fed. R. Civ. P. 5(b). In any event, Sierra Club's motion to strike Cedar Point's experts was not predicated on a failure to comply with deadlines.

[45] Cedar Point also filed an untimely supplement to Carl Oppenheimer's report on April 25, 1994; however, Cedar Point's only purpose in doing so was to ensure the inclusion of this report in the record -- the district

On February 14, 1994, Sierra Club filed a motion to strike Cedar Point's designation of experts as a sanction for failure to comply with the court's accelerated discovery order. Specifically, Sierra Club argued that the initial expert reports filed by Cedar Point were so incomplete and insubstantial that they failed to meet the requirements of the discovery order. On April 19, 1994, the court entered an order granting this motion. The court found that Cedar Point had not complied with its order regarding expert reports and ordered that Cedar Point's designation of experts was stricken, with instructions that none of Cedar Point's experts would be allowed to testify at trial.

Cedar Point maintains that, between its initial expert disclosures and its rebuttal and supplementary disclosures, it did provide enough information to comply with the district court's discovery order. Also, Cedar Point asserts that it cannot be sanctioned for failure to comply with a discovery order because Sierra Club never filed a motion to compel. Finally, Cedar Point argues that the sanction of striking Cedar Point's experts was an abuse of discretion. In this regard, Cedar Point contends that: (1) the subject of its experts' testimony -- the harm caused by Cedar Point's produced water -- was crucial to the court's assessment of penalties against Cedar

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court had already entered an order striking Carl Oppenheimer as a witness a week earlier. Accordingly, we will not consider the untimeliness of this filing in adjudicating Cedar Point's appeal on this issue.

Point; (2) even if Cedar Point's initial expert disclosures were inadequate, there was no prejudice to Sierra Club because Sierra Club received the required information through rebuttal and supplementary disclosures with enough time to prepare for trial; (3) any prejudice to Sierra Club because of untimely disclosures could have been cured through a continuance; and (4) Cedar Point's failure to comply was justified because Sierra Club's complaint and initial disclosures were so vague, general, and irrelevant that the issues in the lawsuit were not sufficiently defined to put Cedar Point on notice of what expert testimony would be needed.

The district court's discovery order required that the parties' initial expert disclosures "include a complete statement of all opinions to be expressed and the basis and reasons therefor" and "the data or other information relied upon in forming such opinions." The Advisory Committee Notes to Rule 26 of the Federal Rules of Civil Procedure state that such reports must be "detailed and complete." Fed. R. Civ. P. 26 advisory committee's note. These Notes also explain that the purpose of the reports is to avoid the disclosure of "sketchy and vague" expert information, as was the practice under the former rule. See id.

The district court's finding that Cedar Point's initial expert disclosures did not meet this standard does not constitute an abuse of discretion. A review of the disclosures bears out this assessment. Don Harper's statement of opinions and reasons was a one-and-a-half page outline listing his "points of testimony."

Carl Oppenheimer offered two one-paragraph descriptions of his opinions. Stanley Pier and John McGowan also provided only one-paragraph statements relating to their opinions. Stanley Pier and John McGowan also provided only one-paragraph statements relating to their opinions. Finally, Joe Haney's statement included no substantive opinions, but only declared what subjects he intended to research and to discuss at trial. Although Cedar Point later reinforced these statements with rebuttal and supplementary disclosures, the discovery order and Rule 26(a) clearly require that the initial disclosures be complete and detailed. The purpose of rebuttal and supplementary disclosures is just that -- to rebut and to supplement. These disclosures are not intended to provide an extension of the deadline by which a party must deliver the lion's share of its expert information. Therefore, we hold that the district court did not abuse its discretion in finding that Cedar Point failed to comply with the expert disclosure provisions of its accelerated discovery order.[46]

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[46] Cedar Point even appears at times to admit that it did not comply with the discovery order by stating that it was "impossible" to comply and that their experts "did all they could do" under the circumstances. The reasons for noncompliance, however, are relevant to the separate issue of whether the sanction imposed was appropriate. On the other hand, a violation of an order is a violation of an order, regardless of the reasons therefor.

In this regard, we note that the question of whether a party has violated a discovery

As authority for its argument that Sierra Club was required to file a motion to compel before seeking sanctions, Cedar Point cites our decision in Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233 (5th Cir. 1988). In Broadcast Music, the plaintiff argued that the defendant should have been estopped from denying certain facts when it failed to produce documents relevant to those facts. Id. at 238. We held that the sanction of estoppel was not available because the plaintiff had not first sought a motion to compel production of the relevant documents. Id. Our rationale, however, was that the pretrial order did not explicitly compel the production of those documents in the first place; rather, the order only stated that "immediate receipt of such documents would expedite plaintiff's preparation of this case for trial or preparation of a motion for summary judgment." Id. In other words, it would have been unfair to sanction the defendant for failure to produce documents that it was never under any clear obligation to produce. In the present case, however, Cedar Point was compelled to

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order will typically not be in dispute, as when a party fails to attend a deposition or refuses to produce certain documents. Where the standard of compliance is a matter of degree, however, such as the degree to which an initial expert disclosure is "complete," disagreement is more likely to occur. The resolution of such disputes is more appropriately left to the discretion of the trial court, and only in an unusual case of clear abuse should an appellate court reverse. See O'Malley, 776 F.2d at 499.

produce the initial expert disclosures from the moment the court entered the accelerated discovery order. It was not necessary for Sierra Club to create a obligation to produce by filing a motion to compel; the obligation was already present.

Moreover, Rule 37 of the Federal Rules of Civil Procedure, which governs the imposition of sanctions for failure to make disclosures, does not require that a party file a motion to compel before moving for sanctions. Instead, the rule states only that, "[i]f a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions." Fed. R. Civ. P. 37(a)(2)(a). Indeed, the Advisory committee Notes to Rule 37 contemplate that it may be more effective in some situations to impose a sanction of excluding evidence instead of an order compelling production:

> [A] motion [to compel] may be needed when the information to be disclosed might be helpful to the party seeking the disclosure but not to the party required to make the disclosure. If the party required to make the disclosure would need the material to support its own contentions, the more effective enforcement of the disclosure requirement will be to exclude the evidence not disclosed. . . .

Fed. R. Civ. P. 37 advisory committee's note. Because Cedar Point intended to use its expert testimony to support its own contentions regarding harm to the environment, the district court could have concluded that excluding this testimony was the most appropriate sanction. Accordingly, we hold that the district court did not abuse its discretion in sanctioning Cedar Point for violating the discovery order without requiring Sierra club to file a motion to compel.

Finally, we review the sanction itself. When a district court strikes a party's designation of expert witnesses and excludes their testimony as a sanction for violation of a discovery order, we determine whether the court's action is an abuse of discretion by examining four factors:

> (1) the importance of the witnesses' testimony;
> (2) the prejudice to the opposing party of allowing the witness to testify;
> (3) the possibility of curing such prejudice by granting a continuance; and
> (4) the explanation, if any, for the party's failure to comply with the discovery order.

See Bradley v. United States, 866 F.2d 120, 125 (5th Cir. 1989) (citing Murphy, 639 F.2d at 235).

With respect to the importance of Cedar Point's witnesses, it is clear that the bulk of their expected testimony concerned the degree of harm caused by Cedar Point's discharge of produced water. Although the district court made findings regarding harm to the environment in assessing the civil penalty against Cedar Point, the court based the amount of the penalty only on the economic benefit accruing to Cedar Point from the violation. Therefore, the stricken testimony ultimately proved to be unimportant to Cedar Point's case.

As to any prejudice to Sierra Club that would result from allowing Cedar Point's witnesses to testify, we note that Sierra Club did receive more detailed information from three of the witnesses in the form of rebuttal reports. While these disclosures were made approximately two months before trial, Sierra Club should have received most of this information in initial expert disclosures a month earlier. Such a delay would have likely resulted in some prejudice to Sierra Club. While a continuance would have given Sierra Club more time to review the late disclosures, such a measure "would neither punish [Cedar Point] for its conduct nor deter similar behavior in the future." Bradley, 866 F.2d at 126.

Finally, Cedar Point's reasons for failure to comply with the district court's discovery order are not persuasive. That harm to the environment would be an issue in this lawsuit was clear from the filing of the action in April 1993. Cedar Point had over nine months to solicit experts and prepare reports on this issue by the February 1, 1994 deadline. Regardless of the specificity of Sierra Club's complaint and initial disclosures, Cedar Point should have been able to produce more information regarding its defense of lack of harm that it did in its initial expert disclosures.

In light of Cedar Point's failure to adhere to discovery deadlines and the fact that the expected testimony ultimately proved to be relatively unimportant, we find that the district court did not abuse its discretion in striking Cedar Point's experts and excluding their testimony.

5. The Penalty and Attorneys' Fees

Cedar Point's fifth argument on appeal is that the district court erred in assessing a penalty of $186,070 against Cedar Point for violating the CWA and in awarding attorneys' fees to Sierra Club. We review the district court's findings of fact in support of the penalty under the clearly erroneous standard. See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 79 (3rd Cir. 1990), cert. denied, 498 U.S. 1109 (1991). With respect to the court's weighing of those facts and determination of the penalty, however, we review for abuse of discretion. See Atlantic States Legal Found, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1142 (11th Cir. 1990). Similarly, we review an award of attorneys' fees for abuse of discretion. Bode v. United States, 919 F.2d 1044, 1047 (5th Cir. 1990).

a. The Penalty

The CWA directs district courts to assess civil penalties for violations of the CWA. 33 U.S.C. §1319(d). Specifically, the statute states that violators "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." Id. Aside from this maximum amount, the statute guides the court's discretion in setting the penalty as follows:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation,

> any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Id. The Eleventh Circuit has taken these statutory directives and developed a procedural framework for calculating penalties under the CWA. Tyson Foods, 897 F.2d at 1142. First, the court is to calculate the maximum penalty that could be assessed against the violator. Id. Using that maximum as a starting point, the court should then determine if the penalty should be reduced from the maximum by reference to the statutory factors. Id.

The district court followed the Tyson Foods framework in this case. The parties had stipulated that there were 797 days of unpermitted discharge of produced water prior to trial. The judgment was entered twelve days later, during which time the discharge presumedly continued. Accordingly, the court multiplied the statutory figure of $25,000 per day by 809 days of unpermitted discharge to arrive a maximum penalty of $20,225,000.

The district court then made findings of fact with respect to the statutory factors. First, the court found that the violation was moderately serious because of the effect of the discharge on benthic organisms[47] and the lack of monitoring and reporting with respect to the discharge. Second, the court found that the economic benefit to Cedar Point from the violation was $186,070, which the court determined was the amount that Cedar Point saved by not disposing of its produced water in a reinjection well. Third, the court found that Cedar Point had been violating the CWA since it began operating state well 1876. Fourth, the court found that Cedar Point had not demonstrated good faith in attempting to comply with the CWA. In this regard, the court noted that, although Cedar Point had attempted to obtain a NPDES permit for its discharge, it had not explored other ways to comply with the CWA. Finally, the court reviewed Cedar Point's financial position and expected future profits from the Cedar Point field and determined that Cedar Point could at least afford a penalty equal to the economic benefit attained from the violation.

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[47] "Benthic" organisms are those that live on the bottom of a water body.

In weighing these facts and calculating the penalty, the district court held that the maximum penalty of $20,225,000 was inappropriate. The court determined, however, that the penalty should at a minimum recapture the savings realized by Cedar Point because of the violation. Although the court's findings with respect to the other statutory factors were also not favorable to Cedar Point, the court apparently chose not to accord these factors any weight because it did not increase the penalty beyond what it found to be the economic benefit to Cedar Point. Accordingly, the court assessed a penalty of $186,070.

In reviewing the district court's findings of fact, we note that the court adopted Sierra Club's proposed findings and conclusions with minimal revision. Under such circumstances, we review the court's findings of fact with caution. FDIC v. Texarkana Nat'l Bank, 874 F.2d 264, 267 (5th Cir. 1989) ("[W]e have shown caution in reviewing district court findings which are essentially verbatim recitals of the prevailing party's proposed findings and conclusions."), cert. denied, 493 U.S. 1043 (1990).

The district court chose to calculate the economic benefit to Cedar Point by reference to the money Cedar Point saved by not disposing of its produced water in a reinjection well. In this regard, the court made the following findings of fact in its Memorandum Opinion:

> According to the testimony of Cedar Point's witnesses, operating an injection well would add $60,000 per year to the operating cost of the Cedar Point field. Consequently, the economic benefit to Cedar Point of its violation of the Clean Water Act is at least $60,000.00 for each full year of operation. According to other Cedar Point testimony, the cost of brine injection is in the range of $.10 to $.20 per barrel. Thus, for 1993, the economic benefit could be determined to be between $42,000 and $84,000.

The court had found that the average daily discharge during the period of violation was 1,150 barrels per day, and there were 809 days of unpermitted discharge at the time the court entered judgment. Using a figure of $.20 per barrel for cost of reinjection, the court thus found that the economic benefit to Cedar Point was $186,070.[48]

On June 6, 1994, Sierra Club filed a motion to alter or amend the district court's findings and conclusions pursuant to Rule 52(b) of the Federal Rules of Civil Procedure.[49] The impetus for this motion, by Sierra Club's admission, was that some of the court's findings and conclusions did not strictly reflect the evidence that was introduced at trial. With respect to the court's findings regarding the economic benefit to Cedar Point, Sierra Club made the following statement:

> The Sierra Club believes that the Court's finding that the cost of injection of produced water would be approximately $0.10 to $0.20 per barrel is adequately supported based on David Russell's testimony that a disposal well would cost approximately $300,000 to outfit initially, and $900.00 per year to operate, as well as Mr. Russell's admission that a Cedar Point representative had testified that one type of injection well would add approximately $60,000 per year in

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[48] $.20/barrel x 1,150 barrels/day x 809 days = $186,070.

[49] At the time of Sierra Club's motion, Rule 52(b) stated, in pertinent part: "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and amend the judgment accordingly." Fed. R. Civ. P. 52(b) (1994).

> operating costs. In addition, this finding is supported by Sierra club Exhibit 9, which is the Federal Register notice published by the Environmental Protection Agency when it proposed its zero discharge permit for produced water. This notice specifically states that studies performed for the EPA showed that cost of brine disposal per barrel to be between $0.15 and $1.02 per barrel. See 57 F.R. 60931. The Court's figure of $.020[sic] per barrel is hence on the conservative end of this spectrum.

In granting this motion, the court did not alter its previous findings, but supplemented those findings with the following paragraph:

> David Russell testified that the cost of injection of produced water would be approximately $.10 to $.20 per barrel and that a disposal well would cost approximately $300,000 to outfit and $900 per year to operate. Further EPA studies show that the cost of brine disposal is between $.15 and $1.02 per barrel. On this basis, $.20 per barrel for disposal of produced water is a reasonable figure within the range found. See (Sierra Club Exhibit #9); 57 F.R. 60931.

Accordingly, the court let its original calculation of the penalty stand.

Some of the district court's findings do not appear to be supported by the evidence.

For example, there was no testimony from any of Cedar Point's witnesses to the effect that a reinjection well would add $60,000 per year to the operating costs of the Cedar Point field. Apparently, John McGowan had mentioned this figure in his deposition, but neither party introduced that deposition into evidence and the court did not allow McGowan to testify at trial. On cross-examination, David Russell testified that, if Cedar Point constructed its own reinjection well, it would not add $60,000 per year to operating costs. Later, on redirect, Russell testified that he had read McGowan's deposition and that the $60,000 figure referred to a type of well that Cedar Point would not use to dispose of its produced water. Also, Russell never testified that the cost of reinjecting produced water would be $0.10 to $0.20 per barrel, nor did he testify that it wold cost $900 per year to operate a disposal well.

The EPA cost studies cited in the court's supplementary findings, however, appeared in an exhibit introduced by both Sierra Club and Cedar Point. This exhibit was the draft NPDES general permit for produced water discharges by Coastal Subcategory operators, appearing at 57 Fed. Reg. 60,926 (1992). In this draft permit, EPA made reference to studies of the costs of reinjection of produced water. Id. at 60,931. The most recent study found that the costs of reinjection of produced water ranged from $0.15 to $1.02 per barrel. Id. Although the court's finding that the cost of reinjection if $.20 per barrel falls within the range stated in the draft permit, Cedar Point argues that this range is not sufficiently specific to be a reliable indicator of what it would have cost to reinject its produced water. Specifically, Cedar Point contends that the permit does not indicate whether this range reflects the costs of paying a commercial reinjection well operator to dispose of produced water or the costs of an oil and gas operator constructing its own reinjection well and disposing of produced water itself. Russell testified that Cedar Point would not have paid a commercial injection well operator to dispose of its produced water because that would have been too expensive. Instead, Russell testified that Cedar Point would have built its own reinjection well and that such a well would have cost $300,000 to outfit initially and $0.0025 per barrel to operate.

Notwithstanding Cedar Point's challenge to the relevance of the EPA cost figures, we do not think that the district court's use of the $0.20 per barrel cost figure and subsequent calculation of an economic benefit to Cedar Point in the amount of $186,070 are clearly erroneous. The district court may have simply chosen to credit the objective evidence from the EPA studies over the testimony of Russell, one of Cedar Point's officers. Also, the court may have resolved any doubts about the accuracy of the EPA studies by choosing a cost figure near the low end of the prescribed range. Finally, and perhaps most importantly, we note that a court need only make a "reasonable approximation" of economic benefit when calculating a penalty under the CWA. Powell Duffryn, 913 F.2d at 80 (citing S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985)). We are satisfied that the court's approximation of economic benefit is reasonable under the facts of this case.

Further, we do not think that the district court abused its discretion in assessing a penalty in an amount that reflected only the economic benefit to Cedar Point.[50] The Supreme Court has described the process of weighing the statutory factors in calculating civil penalties under the CWA as "highly discretionary" with the trial court. *Tull v. United States*, 481 U.S. 412, 427 (1987). It is clear from the district court's Memorandum Opinion that it considered al of the statutory factors before settling on an amount based only on economic benefit. Considering that the court could have imposed a penalty as high as $20,225,000, this appears to be a fair and just result. As such, we perceive no abuse of discretion. Therefore, we affirm the district court's assessment of a penalty in the amount of $186,070 for Cedar Point's violation of the CWA.

b. Attorneys' Fees

Cedar Point's sole argument with respect to attorneys' fees is that, if we hold that Sierra Club lacks standing to bring this action or that Cedar Point has not violated the CWA, Sierra Club would not be entitled to attorneys' fees as the "prevailing party" in this action. *See* 33 U.S.C. §1365(d). Because we have held otherwise, we affirm the district court's award of attorneys' fees.

6. Cedar Point's Counterclaim

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[50] Accordingly, we think it unnecessary to review the district court's findings of fact with respect to the other statutory factors.

Finally, Cedar Point appeals the district court's dismissal of its counterclaim against Sierra club for abuse of process. The court dismissed Cedar Point's counterclaim pursuant to Federal Rules of Civil Procedure 12(b)(6) for failure to state a claim. We review a dismissal for failure to state a claim under the same standard used by the district court: A claim may not be dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); Carney v. RTC, 19 F.3d 950, 954 (5th Cir. 1994).

As the basis for its counterclaim, Cedar Point alleges the following facts: (1) Sierra Club either threatened to sue, or actually sued, all or a number of oil and gas operators in Galveston Bay under the CWA for the stated purpose of stopping unpermitted discharges of produced water; (2) in settling these disputes with the operators, Sierra Club allowed them to continue the allegedly illegal discharges in exchange for monetary consideration; (3) Sierra Club Legal Defense Fund realized substantial profits from these settlements in the form of attorneys' fees, which Sierra Club is using to finance more litigation against oil and gas operators in Galveston Bay; (4) Sierra Club realized some of the monetary consideration; and (5) Sierra Club threatened Cedar Point with a similar suit with the intent to obtain monetary consideration. Cedar Point argues that this pattern of suing and settling with oil and gas operators establishes Sierra Club's intent to use the citizen suit provision of the CWA to extort money from Cedar Point. In this regard, Cedar Point notes that the purpose of a citizen suit is to stop putatively illegal conduct, and yet the terms of Sierra Club's settlements allow this conduct to continue.

Under Texas law, the elements of an action for abuse of process are:

> (1) that the defendant made an illegal, improper or perverted use of the process, a use neither warranted nor authorized by the process; (2) that the defendant had an ulterior motive or purpose in exercising such illegal, perverted or improper use of the process; and (3) that damage resulted to the plaintiff as a result of such illegal act.

Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 378 (Tex. App.--Texarkana, no writ). "When the process is used for the purpose for which it is intended, even though accompanied by an ulterior motive, no abuse of process occurs." Id. (citing restatement (Second) of Torts §682 cmt. b (1977)).

The facts alleged by Cedar Point do not demonstrate an "illegal, improper or perverted" use of the citizen suit provision of the CWA. First, the "intent to sue" letter sent by Sierra Club to Cedar Point was not a "threat"; rather, the CWA requires such letters to be sent at least sixty days prior to the commencement of a civil suit. 33 U.S.C. §1365(b)(1). Further, the fact that Sierra Club has brought suits against other oil and gas operators in Galveston Bay, and that some of these suits were resolved through settlement, does not indicate that Sierra Club was making an illegal use of the citizen suit provision. The consent judgments generally directed the operators to cease discharging produced water after a certain grace period. Allowing such a grace period does not create an inference that Sierra Club's citizen suits were pretext for coercing monetary settlements; EPA itself will provide for grace periods in order to allow dischargers time for compliance. See, e.g., 60 Fed. Reg. 2387, 2394 (1995); see also United States v. Metropolitan St. Louis Sewer Dist. (MSD), 952 F.2d 1040, 1044 (8th Cir. 1992) (holding that district court did not abuse its discretion in approving consent decree that allowed for delay in compliance).

In addition, the operators agreed to make payments to environmental interest organizations other than Sierra Club, provided that such payments would be used for conservation and education, and not for litigation. There is nothing illegal or improper about this sort of provision; indeed, "Congress encourages settlements of this type which preserve the punitive nature of enforcement actions while putting the funds collected to use on behalf of environmental protection." Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990) (internal quotations and citations omitted). The consent judgments did provide for the payment of attorneys' fees and costs incurred by Sierra Club in the litigation; however, we find nothing improper here, as such provisions frequently appear in consent judgments. Finally, we note that these settlement agreements were reviewed and approved by the Department of Justice and EPA, as required by the CWA. 33 U.S.C. §1365(c)(3). In light of these observations regarding Sierra Club's settlements with other oil and gas operators, and our holding today that Sierra Club's suit against Cedar Point is meritorious, we conclude that Cedar Point has failed to state a claim for abuse of process. Therefore, we affirm the district court's dismissal of Cedar Point's counterclaim.

B. Sierra Club's Appeal

In its appeal from the district court's order amending the injunction, Sierra Club raises the following points of error: (1) the district court lacked jurisdiction to amend the injunction; and (2) the district court abused its discretion in amending the injunction. We address each of these arguments in turn.

1. Jurisdiction

We review a district court's exercise of subject matter jurisdiction de novo. Price v. United States, 69 F.3d 46, 49 (5th Cir. 1995); In re Moody, 41 F.3d 1024, 1026 (5th Cir. 1995). Sierra Club contends that the district court lacked jurisdiction to amend its earlier injunction because Cedar Point's notice of appeal from the final judgment divested the district court of jurisdiction over the action. Sierra Club recognizes that there are exceptions to the divestment of jurisdiction under Rule 60(b) and Rule 62(c) of the Federal Rules of Civil Procedure, but argues that those exceptions do not apply.

The district court did not cite either rule as authority for its order amending the injunction, but Sierra Club addresses each possibility. If we hold that the authority for the amendment of the injunction was Rule 60(b), Sierra Club argues that the district court lacked jurisdiction because the court did not misinterpret or misapply the law and EPA's administrative order did not moot the court's initial injunction. On the other hand, if rule 62(c) is the relevant authority, Sierra Club contends that a district court lacks jurisdiction under that rule to dissolve an injunction once its validity has been appealed.

Generally, a notice of appeal divests the district court of jurisdiction over the judgment or order that is the subject of the appeal. Henry v. Independent Am. Sav. Ass'n, 857 F.2d 995, 997 (5th Cir. 1988). Rule 62(c) provides an exception to this principle. That rule provides, in part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed. R. Civ. P. 62(c). We have held, however, that the authority granted by Rule 62(c) does not extend to the dissolution of an injunction. Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817, 819 (5th Cir. 1989). In addition, we have held that the district court's power to alter an injunction pending appeal is limited to "maintaining the status quo." Id. at 820.

In the present case, the district court's amending order is more appropriately characterized as a modification -- as opposed to a dissolution -- of the original injunction, bringing the court's action within the ambit of Rule 62(c). A "dissolution" would imply that the amending order altered the original injunction so that it no longer had any effect. That is not the case here. The amending order stated that Cedar Point was not enjoined from discharging produced water as of the effective date of the final NPDES general permit and compliance order "so long as it complies with the terms of said General Permit and Compliance Order." The permit and compliance order contain several conditions, including the submission of a compliance plan, operating and maintenance requirements, and notification procedures. 60 Fed. Reg. 2387, 2389-94 (1995). If Cedar Point fails to comply with any of these terms, the court's order will act to enjoin the discharge of produced water and to impose a penalty for such discharge. Therefore, we hold that the district court's amending order had the effect of modifying the injunction under Rule 62(c), rather than completely dissolving it.

Further, we do not think that the modification exceeded the district court's limited authority to alter an injunction to "maintain the status quo." The court's original order stated that "Cedar Point Oil is enjoined from any further discharges of produced water from the Cedar Point Field to the waters of Galveston Bay, until such time as it secures an NPDES permit for such discharges." Strictly speaking, the NPDES general permit issued by EPA on January 9, 1995, is a permit for the discharge of produced water by Coastal Subcategory operators, including Cedar Point; the limitation contained in the permit, however, requires zero discharge. The effect of the compliance order is that operators covered by the general permit who were discharging produced water on the effective date of the permit are allowed to discharge produced water until January 1, 1997, so long as they continue to take affirmative steps to comply with the zero discharge limitation. The district court could have reasonably read the permit and order together as creating an opportunity for Cedar Point to be covered by a NPDES permit and to discharge produced water while covered by that permit. Accordingly, the district court modified its injunction to allow Cedar Point to take advantage of that opportunity.

With respect to the jurisdictional question, it is significant that the injunction by its own terms created the possibility for a change in its operation. Stated differently, part of the "status quo" of this action is that the court's injunction has ongoing effect, and that effect was subject to change depending upon subsequent developments. The court did not exceed its authority in stepping in to supervise this change through an amendment of its original order. Accordingly, we hold that the district court had jurisdiction under Rule 62(c) to amend its original order with respect to the injunction.

2. Modification of the Injunction

We review a district court's orders under Rule 62(c) for abuse of discretion. See Wildmon v. Berwick Universal Pictures, 983 F.2d 21, 23 (5th Cir. 1992). Sierra Club contends that the district court abused its discretion in modifying the injunction because the modification was contrary to the original purpose of the injunction. Specifically, Sierra Club argues that the general NPDES permit does not give Cedar Point the authority to discharge produced water, and therefore does not trigger a change in the injunction's effect. To the contrary, Sierra Club points out that the permit prohibits Cedar Point from discharging produced water and that only after the court altered its injunction was Cedar Point eligible for the two-year grace period established by the compliance order. Consequently, Sierra Club concludes that the court misread the permit and order as creating a "carte blanche" for oil and gas operators in Galveston Bay to discharge produced water until 1997.

Generally, a court should only modify an injunction to achieve the original purposes of the injunction, if those purposes have not been fully achieved. See United States v. United Shoe Machinery Corp., 391 U.S. 244, 248-49 (1968). We did not dispute Sierra Club's reading of the final general NPDES permit and compliance order; nevertheless, we do not think that the district court's modification of the injunction deviated from the original purpose of the injunction. That purpose was to prohibit the unpermitted discharge of produced water into Galveston Bay. Under the injunction as modified, Cedar Point is subject to a general permit applying to all produced water discharges by Coastal Subcategory operators in Louisiana and Texas and is legally discharging produced water according to the terms of the compliance order. Meanwhile, the injunction remains in effect and provides for penalties against Cedar Point if it violates the terms of the general permit or compliance order. Also, under the terms of the compliance order, Cedar Point will have to take affirmative steps to eliminate its produced water discharges and, in any event, will have to cease such discharges by January 1, 1997. Finally, we note that the ordering of Cedar Point's legal obligations effected by the modified injunction is highly preferable; that is, it is more appropriate that Cedar Point's produced water discharges are primarily regulated by a permit and order issued by EPA than by a continuing injunction supervised by a federal district court. Accordingly, we hold that the district court did not abuse its discretion in modifying the original injunction.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20461 AND 95-20227

SIERRA CLUB, Lone Star Chapter
Plaintiff - Counter Defendant - Appellee
v.
CEDAR POINT OIL COMPANY, INC.
Defendant - Counter Claimant - Appellant

SIERRA CLUB, Lone Star Chapter
Plaintiff - Counter Defendant - Appellee
v.
CEDAR POINT OIL COMPANY, INC.
Defendant - Counter Claimant - Appellant

SIERRA CLUB, Lone Star Chapter,
Plaintiff - Counter Defendant - Appellee
v.
CEDAR POINT OIL COMPANY, INC.,
Defendant - Counter Claimant - Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

(February 12, 1996)

Before REYNALDO G. GARZA, KING, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by Cedar Point Oil Company, Inc. in the above case is denied.

ENTERED FOR THE COURT:

s/ Carolyn Denise King
United States Circuit Judge

REHG-2

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 94-20461

SIERRA CLUB, ONE STAR CHAPTER,
Plaintiff-Counter-Defendant-Appellee,
v.
CEDAR POINT OIL COMPANY, INC.,
Defendant-Counter-Plaintiff-Appellant.
Consolidated with
No. 95-20227
SIERRA CLUB, LONE STAR CHAPTER,
Plaintiff-Counter-Defendant-Appellant,
v.
CEDAR POINT OIL COMPANY, INC.,
Defendant-Counter-Claimant-Appellee

Appeals from the United States District Court for the Southern District of Texas

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Before REYNALDO G. GARZA, KING and HIGGINBOTHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that Sierra Club's application for attorneys' fees and costs is GRANTED IN PART. Sierra Club is awarded a total of $10,000 in fees and costs for the appeal. The amount of fees requested for the appeal is excessive considering the fees already awarded by the district court and the usefulness of Sierra Club's appellate briefs.

IT IS FURTHER ORDERED that Cedar Point's motion to strike Sierra Club's application as untimely filed is DENIED.

FILED FEB. 14, 1996

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SIERRA CLUB, LONE STAR CHAPTER,
Plaintiff
VS. CIVIL ACTION NO. H-93-1147
CEDAR POINT OIL COMPANY,
Defendant.

ORDER AMENDING/SUPPLEMENTING THE COURT MEMORANDUM

The motion to amend or alter the Court's memorandum of findings (instrument #98) is Granted. The Court made these additional amendments or alterations in its findings and conclusions:

a) At page 7, the Court supplements its findings as follows:

David Russell testified that the cost of injection of produced water would be approximately $.10 to $.20 per barrel and that a disposal well would cost approximately $300,000 to outfit and $900 per year to operate. Further, EPA studies show that the cost of brine disposal is between $.15 and $1.02 per barrel. On this basis, $.20 per barrel for disposal of produced water is a reasonable figure within the range found. See (Sierra Club Exhibit #9); 57 F.R. 60931.

b) At page 6, the Court supplements or modifies the first full paragraph as follows:

The uncontradicted testimony shows that a produced water discharge, such as Cedar Point's, would result in fewer benthic organisms and fewer species of benthic organisms in the area of the discharge. However, the testimony did not indicate the exact extent of the area of impact of the discharge.

The Court amends the awards for attorneys fees by increase the award from $60,000 to $82,956.86.

It is so ORDERED.

Signed this 20th day of June, 1994.

/s/ KENNETH M. HOYT
United States District
Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SIERRA CLUB, LONE STAR CHAPTER,
Plaintiff
VS. CIVIL ACTION NO. H-93-1147
CEDAR POINT OIL COMPANY,
Defendant.

MEMORANDUM OPINION FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court granted the Sierra Club's motion for partial summary judgment on the issue of liability, holding that Cedar Point Oil Company was discharging pollutants into the waters of the United States without an NPDES permit,[1] in violation of 33 U.S.C. §1311(a). In that judgment this Court specifically held that Sierra Club had standing to pursue enforcement of this Clean Water Act claim. Consequently, the following findings of fact and conclusions of law relate to the Sierra Club's claim for civil penalties and injunctive relief. The Court has reviewed the evidence and the law and makes the following findings and reaches the included conclusions.

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[1] NPDES is an acronym for National Pollutant Discharge Elimination System. The Environmental Protection Agency issues the permit and the permit has not been issued. The defendant's application was made on or about October 15, 1992, approximately a year after the discharge commenced.

FINDINGS OF FACTS

Cedar Point Oil Company is a Mississippi corporation operating an oil and gas well and associated facilities in the Cedar Point Field in Chambers County, Texas. At this time, the Cedar Point Field consists of one producing well, located in Galveston Bay, a number of non-producing wells, and a shore facility located on the eastern shore of the Galveston Bay. This case concerns the Discharge into Galveston Bay of "produced water" from the Cedar Point Field.

Produced water is the formation water that is frequently produced along with oil and gas during oil and gas production. When oil and gas is produced, the produced water is separated out and disposed of either by injection into a subsurface formation or, in some cases, by discharge into the surface waters.

Cedar Point began production of oil and gas at the Cedar Point Field on September 10, 1991. At the time it began its discharge, Cedar Point obtained a Tidal Disposal Permit from the Texas Railroad Commission pursuant to Texas law. At no time during its discharge has Cedar Point done so pursuant to a NPDES permit. The evidence indicates that the EPA has not issued permits for produced water discharges as a general principle. Nevertheless, as of December 22, 1992, the EPA proposed a general NPDES permit for coastal oil and gas production facilities, the terms of which would bar discharges of produced water in coastal Texas, which includes discharge from the Cedar Point Field.

When the Sierra Club discovered the Cedar

Point discharge, it sent a notice of intent to Cedar Point Oil pursuant to 33 U.S.C. §1365, based on the contention that Cedar Point was discharging produced water without an NPDES permit violated the Clean Water Act. 33 U.S.C. §1311(a).

Following the December 15, 1992, notice Cedar Point filed a suit in the United States District Court for the Southern District of Mississippi, seeking to force the Environmental Protection Agency to rule on its permit application and to have that court enjoin the Sierra Club from filing a citizen suit against it. That court held that Cedar Point had failed to state any cognizable cause of action against Sierra Club. Sierra Club filed this citizen suit shortly thereafter against Cedar Point seeking injunctive relief and assessment of civil penalties.

It is undisputed that in producing its well in the Cedar Point Field, Cedar Point has been discharging produced water into Galveston Bay since September 10, 1991. The parties have stipulated that discharge took place on 797 days prior to the date of trial, and that it has continued even during the trial.

The records filed with the Texas Railroad Commission by Cedar Point, and stipulated to by the parties, show that the average discharge from the Cedar Point facility was between 500 and 1200 barrels per day, throughout the period of discharge. These records also reflect the average daily discharge for this period to have been 1,150 barrels per day.. A barrel contains 42 gallons.

According to the expert testimony proffered by both the Sierra Club and Cedar

Point, produced water can contain a number of substances. Those substances typically found in produced water include chemicals such as benzene, toluene, naphthalene and xylene, salts in concentrations several times that of seawater, metals such as iron and barium, ammonia, and radioactive materials. As a result of these pollutants, produced water may be toxic to marine life, even in low concentrations. Scientific studies have shown that populations of sediment dwelling organisms are frequently depressed or absent in the area of produced water discharges.

The expert testimony introduced by Sierra Club and Cedar Point shows that the produced water discharged by Cedar Point is typical of produced water in the Coastal Gulf of Mexico. Specifically, the testing performed on the discharge shows that Cedar Point's produced water contained the following constituents:

Radioactive constituents

Radium 226	159.2	pCi/L	(2/14/94)
Radium 228	506.3	pCi/L	(2/14/94)
Benzene:	1.07	mg/L	(6/12/92)
Naphthalene:	120	mg/L	(12/12/91)
Phenolics:	2.4	mg/L	(12/12/91)
Total Organic Carbon	86	mg/L	(12/12/91)
Total Suspended Solids	49	mg/L	(12/12/91)
Total Dissolved Solids	98,871	mg/L	(12/10/91)
Turbidity	80		(12/10/91)
Ammonia (as nitrogen)	34.7	mg/L	(12/12/91)
Barium	2.38	mg/L	(12/12/91)
Bicarbonate	415	mg/L	(12/10/91)

Calcium	2,200	mg/L	(12/10/91)
Chlorides	60,000	mg/L	(12/10/91)
Iron	36	mg/L	(12/10/91)
Magnesium	341	mg/L	(12/10/91)
Manganese	0.40	mg/L	(12/12/91)
Potassium	109	mg/L	(12/12/91)
Silicon	15	mg/L	(12/12/91)
Sodium	35,834	mg/L	(12/10/91)
Sulfate	44	mg/L	(12/10/91)
Zinc	0.227	mg/L	(12/12/91)

Later testing, performed in preparation for this suit, showed lower amounts of naphthalene in the discharge than was present in the 1991 testing. In addition, other testing for radium 226 and 228 showed widely varying quantities of these materials in the discharge. By stipulation, the parties agreed that oil and grease concentrations ranged from less than 1 mg/L to 18 mg/L. Clearly, there is a good deal of variation in the amounts of pollutants found in the discharge. The expert testimony of Mr. Duane Chapman further showed that Cedar Point's produced water showed toxic effects on test organisms in concentrations as low as approximately 10%.

Testing in the area of the Cedar Point discharge showed that the benthic, or bottom dwelling organisms in the area of the discharge were adversely impacted. Specifically, the evidence shows that there were fewer benthic organisms, and fewer species of benthic organisms in the area of the discharge. However, the testing performed was not sufficient to determine the exact area of impact of the discharge.

The testimony also shows that it is

technically and financially feasible to dispose of produced water to another subsurface stratum through an injection well. Cedar Point and its principals are familiar with this technology and, in fact, uses it in many other fields.

According to the testimony of Cedar Point's witnesses, operating an injection well would add $60,000 per year to the operating cost of the Cedar Point Field. Consequently, the economic benefit to Cedar Point of its violation of the Clean Water Act is at least $60,000 for each full year of operation. According to other Cedar Point testimony, the cost of brine injection is in the range of $.10 to $.20 per barrel. Thus, for 1993, the economic benefit could be determined to be between $42,000 and $84,000. Although the start-up costs may be great, the ultimate cost of operations is a mere "drop in the Gulf" in relation to the harm caused.

The evidence shows that prior to trial of this matter, Cedar Point repeatedly contended that its produced water discharge was simply seawater, was not toxic, and did not contain radioactive material. The evidence contradicts this contention. In fact, Cedar Point's produced water is radically different in composition from seawater, is toxic to marine life, and contains radioactive material in significant amounts.

Finally, the evidence further shows that Cedar Point has repeatedly ignored its obligations under the Clean Water Act. Along these lines, it has sought to minimize its role as a polluter and compare the damage done by it in the Gulf to that in other bays of bodies of water without producing any evidence establishing the cause of the conditions in other bays or bodies of water. Irrespective of the cause these, this condition cannot be tolerated.

CONCLUSIONS OF LAW

This Court has subject matter jurisdiction of this dispute pursuant to 43 U.S.C. §1331 and 33 U.S.C. §1356. Venue is proper in the Southern District of Texas under the provisions of 33 U.S.C. §1365, in that the discharge to the waters of the United States, forming the subject of the action, are located in the district. The question before the Court is what penalties are appropriate for the violations and conduct shown by the Cedar Point Oil Company.

The Nuclear Regulatory Commission's ("NRC") regulations require that the radium 226 content of an effluent discharged from an NRC licensed facility, such as a nuclear power plant, into unrestricted access waters not exceed 60 pCi/L. 10 CFR §§20.1001 to 20.2401 Appendix B (1993). NRC regulations require that the radium 228 content of an effluent discharged from an NRC licensed facility into unrestricted access waters not exceed 60 pCi/L. 10 CRF §§20.1001 to 20.2401 Appendix B (1993).

Benzene, naphthalene, barium and zinc are specifically listed by the EPA as toxic pollutants under the Clean Water Act. 40 CRF §401.15 (1992). Oil and grease and total suspended solids are specifically listed by the EPA as contentional pollutants under the Clean Water Act. 40 CFR §401.16 (1992).

The civil penalty provision of the Clean Water Act provides guidance on the retribution issue. Section 1319(d) provides a two-step process for courts to use in setting the appropriate civil penalty. First, a court is to calculate the maximum penalties than can be awarded against a violator. Second, by using the maximum penalty as a guideline, a court is to set the actual penalties by analyzing the specific statutory factors. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir.1990).

Section 1319(d) provides:

> Any person who violates section 1311 ... of this title ... shall be subject to a civil penalty not to exceed $25,000 per day for each violation.
>
> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. §1319(d).

In evaluating the seriousness of the violations, the Court looks to several factors, including but not limited to: (1) the number of violations; (2) the duration of noncompliance; (3) the significance of the violation (degree of exceedance and relative importance of the provision violated); and (4) the actual or potential harm to human health and the environment. *Hawaii's Thousand Friends v.*

Honolulu, 821 F.Supp. 1368, 1383 (D.Hawaii 1993).

In determining the economic impact of the penalty, courts look to the indebtedness of the violator as well as the impact on operations a penalty would impose. See *U.S. v. Confederate Acres*, 767 F.Supp. 834,839(Ky.1990); *Atlantic States Legal Foundation v. Universal Tool*, 786 F.Supp. 743,753 (N.D. Ind. 1992). Although economic impacts on the violator are considered, "Congress clearly struck the balance in favor of the environment notwithstanding the Act's economic impact on dischargers of pollutants." *U.S. v. City of Niagara Falls*, 706 F.Supp. 1053, 1062 (W.D.N.Y.1989).

The Court must also look to the traditional equitable standards that might apply in determining whether to grant injunctive relief to remedy a violation of the Clean Water Act. *Weinberger v. Romero-Barcelo*, 466 U.S. 305, 312 (1982). These standards include consideration of whether there is irreparable injury and no adequate remedy at law, whether the balance of the equities supports the grant of an injunction, and whether the injunction would be in the public interest. See *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 544-47 (1987); *Lewis v. S. S. Baune*, 534 F.2d 1115, 1123-24 (5th Cir. 1976).

In addition to penalties, the Court may award costs of litigation, including reasonable attorney and expert witness fees to any prevailing or substantially prevailing party. Where, as here, a party has prevailed on the merits, fees and costs shall be awarded.

Atlantic States Legal Foundation, Inc. v. Tyson Foods, 897 F.2d 1128, 1142 (11th Cir. 1990). Consequently, an award of attorney's fees and costs to the Sierra Club is appropriate.

The legislative purposes of the civil penalty provision of the Clean Water Act, 33 U.S.C. §1319(d), are restitution, deterrence, and retribution. See *Tull v. United States*, 481 U.S. 412, 422-23 (1987); *Atlantic States Legal Foundation v. Universal Tool*, 786 F.Supp. 743, 753 (N.D.Ind. 1992). The evidence shows the restitution amounts to be at least the sums saved by Cedar Point's failure to follow the law; $183,310.00 through May 15, 1994.[2]

Considering the maximum penalty that could be imposed on Cedar Point Oil Company ($20,225,000 or $25,000 times 809 days of unpermitted discharge) the Court concludes that this penalty is sufficient.

The Court finds that the maximum penalty is not appropriate, and that the penalty should be reduced based on the following factors from under title 33 U.S.C. §1319;

> a) Seriousness of the violation: Cedar Point's discharge of produced water appears to have affected benthic organisms in an area of bay bottom out to an uncertain distance, at least 75 feet, from the discharge. There is no means of knowing what toxic effects this discharge has had on other marine

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[2] This sum is determined by multiplying the stipulated days times the average barrel per day discharged times the cost of brine injection per barrel. (797 x 1150 x $.20).

life or wildlife. It is of particular significance that Cedar Point was not even aware that it was discharging radioactive material until well after this lawsuit was filed, and no regular monitoring of the discharge has been performed. Finally, the lack of any regular testing or NPDES permit reporting of this discharge for any pollutant other than oil and grease prevented the public from knowing, by any means short of litigation, what pollutants in what quantities were being discharged to the public waters of Galveston Bay. In light of these factors, the Court finds that this violation is a moderately serious one.

b) Economic benefit to the violator: $186,070. Consequently, the penalty imposed must at a minimum recapture this savings to Cedar Point.

c) History of such violations: The evidence shows that Cedar Point Oil Company has been in violation of the Clean Water Act since it began operations at the Cedar Point Field.

d) Good faith efforts of the violator: Cedar Point has not demonstrated good faith in its attempts to comply with the Clean Water Act. Cedar Point made no attempt to explore ways to comply with the Clean Water Act, for example by outfitting an injection well. Rather, Cedar Point made repeated claims of improper conduct against the Sierra Club and its attorneys, none of which proved to have any legal basis. The fact that the EPA has failed to act on Cedar Point's application for an NPDES permit is relevant, but does not excuse Cedar Point's violations. This is particularly so considering Cedar Point's failure to consider other means of coming into compliance with the Clean Water Act.

e) Economic impact of a penalty on the violator: Cedar Point contends that it will be bankrupted by any penalty. Cedar Point's production and revenue statements from the well, however, show that for 1993 the field in question produced an income stream, net of royalties and operating expenses, of approximately $161,000. The legal fees generated by its defense of this action are also included in these operating expenses. Cedar Point's witnesses testified that the well presently producing could continue to produce for approximately 25 years. Cedar Point also has available to it a line of credit, that it has utilized in the past. Further, Cedar Point admits that it has plans to develop

> additional production in the Cedar Point Field. Based on all these findings, the Court concludes that Cedar Point can pay penalties in an amount at least equal to the savings in operating costs it has realized. Consequently, a civil penalty in the amount of $186,070 is appropriate.

Considering the foregoing, Cedar Point is assessed a civil penalty in the amount of $186,070. This sum is to be paid in two equal amounts over the next 180 days. The first to be due on or before August 3, 1994, and the remainder on or before November 30, 1994.

With respect to the factors relevant to the Sierra Club's request for permanent injunctive relief, the Court finds the following:

> a) Irreparable injury/no adequate remedy at law: The Sierra Club is suffering irreparable injury, and has no adequate remedy at law. The damage to aquatic life in the area of the Cedar Point discharge cannot be quantified, and cannot be redressed through monetary damages. Likewise, there is no adequate monetary redress for Cedar Point's failure to monitor its discharge for pollutants on a regular basis.
>
> b) Balance of equities: The balance of equities clearly favors the issuance of an injunction against further unpermitted discharge. Cedar Point has a means

> available to dispose of its produced water other than by discharge to Galveston Bay. To allow it to continue to discharge pollutants to public waters, simply because it is less expensive to do so, would be clearly inequitable to the public.
>
> c) The public interest: Issuance of an injunction against further unpermitted discharges is clearly in the public interest. The Clean Water Act clearly struck the balance in favor of eliminating discharges to waters of the United States. The only interest Cedar Point identified is its interest in keeping costs at this field to a level it finds more acceptable.

Considering the foregoing, it is hereby ORDERED that Cedar Point Oil is enjoined from any further discharges of produced water from the Cedar Point Field to the waters of Galveston Bay, until such time as it secures an NPDES permit for such discharges. Provided that Cedar Point Oil Company fails to comply, for each day of violation past August 31, 1994, the defendant is to pay $250.00 per day in additional penalties.

With respect to the Sierra Club's prayer that it be awarded reasonable fees and costs, the court concludes that the Sierra Club has substantially prevailed in this litigation and that such an award is appropriate. Sierra Club is awarded $60,000 for its reasonable fees and costs in this case. The plaintiff shall designate the entities to which these penalties are to be paid on or before June 15, 1994, by filing an appropriate motion and order with the Court.

It is so ORDERED.

Signed this 27th day of May, 1994.

/s/ KENNETH M. HOYT
United States District
Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SIERRA CLUB, LONE STAR CHAPTER
Plaintiff,
v.
CIVIL ACTION
NO. H-93-1147

CEDAR POINT OIL COMPANY,
Defendant.

PARTIAL SUMMARY JUDGMENT ORDER

This is a citizen's suit brought by the plaintiff, the Lone Star Chapter of the Sierra Club, against the defendant, Cedar Point Oil Company, under the Clean Water Act ("Act") for injunctive relief and for assessment of civil penalties based on discharges of alleged pollutants. Pending before the Court are the plaintiff's motions to dismiss Cedar Point's counterclaim pursuant to Rule 12(b)(6) and for partial summary judgment on the issues of liability, pursuant to Rule 56 of the F.R.C.P. Also before the Court is Cedar Point's cross-motion for summary judgment. The Court, having reviewed the motions, the responses thereto, the record on file, and the applicable law, is of the opinion that the Sierra Club's motions shall be granted and Cedar Point's motion shall be denied.

Facts & Procedural History

Cedar Point is the operator of an oil and gas well and associated facilities in the Cedar Point field in Chambers County. Cedar Point has been discharging produced water,[1] from its well since September 1991, and that discharge continues today without a federal National Pollutant Discharge Elimination system ("NPDES") permit.

The Sierra Club gave the requisite 60-day notice of intent to sue pursuant to §505(b), Title 33 U.S.C. §1365(b), and then filed suit in federal court. Cedar Point answered asserting, in its counterclaim, that the Sierra Club was bringing suit only because Cedar Point refused to make monetary contributions to environmental groups as had other polluters. In this motion to dismiss Cedar Point's counterclaim, the Sierra Club argues that Cedar Point's purported counterclaim does not state a claim upon which relief may be granted, and requests partial summary judgment on the issue of liability. Cedar Point filed a cross-motion for summary judgment on the theory that the Sierra Club lacks standing to sue and also argues that it is not in violation of the Act.

Authorities and Discussion

The Court will first address Cedar Point's cross-motion for summary judgment. Previously, by order dated August 2, 1993, the Court rejected Cedar Point's standing argument. In order to confer standing, the party invoking the Court's authority must show that he personally has suffered some actual or threatened injury and that the injury can fairly be traced to the challenged action and is likely to be redressed by a favorable decision. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

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[1] The same geological strata that holds oil and gas often hold water, as well. When oil and gas are produced, this water is produced along with them. This formation water frequently contains high levels of chlorides, oil and grease, and volatile organic compounds such as benzene and naphthalene.

The affidavits of Sierra Club members, Mark Muhich, John Sommers, and Tommy Douglas, state that they use Galveston Bay for recreational enjoyment and that those activities are impaired by the "produced" water pollution in the bay. The affidavits also establish that the injury suffered by its members is fairly traceable to Cedar Point's illegal discharge. Thus, the members' allegations are sufficient to establish an individual injury that in fact is traceable to Cedar Point. Assuming the affidavits to be credible, they are sufficient to defeat a motion for summary judgment. Arkansas Wildlife Federation v. Bekaert Corp., 791 F.Supp. 769, 776 (W.D.Ark.1992)

Both parties move for summary judgment on the issue of liability. §301 of the Act prohibits the discharge of any pollutant, except in compliance with a valid permit or pursuant to a specific exemption in the Act. Title 33 U.S.C. §1311(a). To establish a violation of the Act, the Sierra Club need only show that (1) a person (2) added a pollutant (3) from a point source (4) into navigable water, and that (5) the discharge was not authorized by a valid NPDES permit. Title 33 U.S.C. §1311.

Cedar Point concedes that there are no

genuine issues of material fact except as to whether it is discharging a pollutant within the meaning of the Act, and it argues that, even if it were, its discharge is not illegal because it complies with the EPA's oil and grease effluent limitation on coastal discharges. Cedar Point argues that its produced water is not a pollutant because the constituents occur naturally in the bay and because produced water is not listed specifically in the Act. Cedar Point's analysis of its produced water shows that the water contains: sodium, calcium, magnesium, barium, iron, chlorides, sulfate, bicarbonate, ammonia, naphthalene, benzine, phenolics, and total suspended solids.

Although there is no precedent or regulations addressing whether produced water is a pollutant under the Act, it is well settled that the constituents of produced water, such as the oil and gas wastes, are pollutants in other contexts. In interpreting the Federal Water Pollution Control Act, the EPA has listed oil and grease and totally suspended solids as conventional pollutants. 40 C.F.R. §401.16 (1992). Benzene, naphthalene, barium, and zinc are also listed as toxic pollutants. 40 C.F.R. §401.15 (1992). Furthermore, courts have found other substances that do not appear in the statutory list of pollutants as pollutants. United States v. Hamel, 551 F.2d 107, 110 (6th Cir. 1977).

Cedar Point argues that its discharge does not constitute an "addition" of a pollutant, because the pollutants in its produced water occur naturally in Galveston Bay. The term "addition" is not defined in the Act. However, courts have interpreted the term to mean the introduction of a pollutant from the "outside world" to water. National Wildlife Federation v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982).

In the instant case, Cedar Point is introducing pollutants from the sub-strata -- the oil and gas formation from which it is producing -- into Galveston Bay. The sub-strata is separate from the bay. It is a separate geologic formation; hence, it may be characterized as the "outside world" for purposes of meeting the "addition" requirement. That the constituents complained of by the plaintiff in Cedar Point's produced water, occur naturally in the receiving water, does not change their status as pollutants. Id. (dead fish passing through a dam are "pollutants," though they occur naturally in the receiving lake).

Therefore, the Court concludes, as a matter of law, that Cedar Point "added a pollutant" to Galveston Bay within the meaning of the Act. These definitional questions are legal in nature and summary judgment is appropriate where an interpretation of regulations is required. See Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1057 (5th Cir. 1991)(treating definitional questions as issues of law). Cedar Point contends that an NPDES permit is not required for its discharge because the discharge conforms to the federal effluent limitations for oil and gas discharges. However, compliance with effluent limitations does not abrogate the NPDES permit requirement. Id. at 1060, n.3.

Lastly, the Court addresses the Sierra Club's motion to dismiss the counterclaims of

Cedar Point. The standard applied to a 12(b)(6) motion has traditionally been a strict one: the complaint is to be dismissed only if "it appears beyond doubt the [pleader] can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45 (1957). In exercising its function, the district court is required to accept all of the factual allegations of the complaint as true, and construe them most favorably to the plaintiff. La Porte Const. Co., Inc. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1255 (5th Cir. 1986). However, the court is not required to accept as true "bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation." Roth v. U.S., 952 F.2d 611, 613 (1st Cir. 1991)

Cedar Point alleges that the Sierra Club has sent intent to sue letters to a number of produced water dischargers and has allowed a number of operators to continue discharging into Galveston Bay in exchange for a large monetary contribution to environment groups. In effect, it views the Sierra Club's litigation tactics as an attempt to extort a similar payment from Cedar Point.

The only recognizable cause of action that Cedar Point's counterclaim identifies is that of abuse of process. The elements of the tort of abuse of process are 1) that the Sierra Club made an illegal, improper or perverted use of the process, a use neither warranted nor authorized by the process; 2) that the Sierra Club had an ulterior motive or purpose in exercising such illegal, perverted or improper use of the process; 3) and that Cedar Point was

damaged. Vahlsing v. Commercial Union Insur. Co., Inc., 928 F.2d 486, 490 (1st Cir. 1991); Baubles & Beads v. Louis Vuitton, S.A., 766 S.W.2d 377, 378 (Tex. App.--Texarkana 1989, no writ).

The core wrong against which the tort of abuse of process is directed to is the filing of frivolous claims for the purpose of harassment. Here, by contrast, the Sierra Club has filed a claim found to be meritorious by the Court, therefore, such action does not constitute abuse of process. Moreover, assuming *arguendo*, that the Sierra Club did not sue others who discharged pollutants in exchange for a monetary contribution, Cedar Point would still not be relieved from liability because of its own liability.

For the foregoing reasons, the Sierra Club's motion to dismiss Cedar Point's counterclaim is GRANTED; the Sierra Club's motion for partial summary judgment on the issue of liability is GRANTED; and Cedar Point's motion for summary judgment is DENIED.

It is so ORDERED.

Signed this 1st day of March, 1994.

s/KENNETH M. HOYT
United States District
Judge

APPENDIX G

STATUTES

33 U.S.C.:

§1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

§1314. Information and guidelines

(b) Effluent limitation guidelines. For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title [enacted Oct. 18, 1972], regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall --

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and

categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act [33 USCS §1311(b)(1)] shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirement), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternative for classes and categories of point sources (other than publicly owned

treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act [33 USCS §1311(b)(2)] to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the the discharge of pollutants; and

(4) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 301(b)(2)(E) of this Act [33 USCS §1311(b)(2)(E) to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirement), and such other factors as the Administrator deems appropriate.

§1362. Definitions

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act [33 USCS §1322]; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production ad disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

§1365. Citizen suits

(a) **Authorization; jurisdiction.** Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf --

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 USCS §1319)d)].

(d) Litigation costs. The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

APPENDIX H

REGULATIONS

40 C.F.R.:

Subpart D -- Costal Subcategory

§435.42 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of facility, raw materials, production processes, product produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations.

(a) The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent limitations - Oil and grease (In milligrams per liter)

Pollutant parameter waste source	Maximum for any 1 day	Average values for 30 consecutive days shall not exceed	Residual chlorine minimum for any 1 day
Produced water	72	48	NA
Dock drainage	(1)	(1)	NA
Drilling muds	(1)	(1)	NA
Drill cuttings	(1)	(1)	NA
Well treatment	(1)	(1)	NA
Sanitary:			
M10	NA	NA	(2) 1
M91M (3)	NA	NA	NA
Domestic(3)	NA	NA	NA

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(1) No discharge of free oil.

(2) Minimum of 1 mg/l and maintained as close to this concentration as possible.

(3) There shall be no floating solids as a result of the discharge of these wastes.

60 Fed.Reg. 2387 (1/9/95)

Final NPDES General Permits for Produced Water and Produced Sand Discharges From the Oil and Gas Extraction Point Source Category to Coastal Waters in Louisiana (LAG290000) and Texas (TXG290000)

AGENCY: Environmental Protection Agency, Region 6.

ACTION: Issuance of Final NPDES Permits.

SUMMARY: Region 6 of the United States Environmental Protection Agency (EPA) today issues final NPDES General Permits regulating discharges of produced water and produced sand derived from oil and gas point source facilities. The permits prohibit the discharge of produced water and produced sand derived from Coastal Subcategory (40 CFR part 435, subpart D) to any water subject to EPA jurisdiction under the Clean Water Act. Discharges to "coastal" waters of Louisiana and Texas of produced water and produced sand derived from most Stripiper Subcategory (40 CFR part 435, subpart F) and all Offshore Subcategory (40 CFR part 435, subpart A) facilities covered by these permits are prohibited. Under Permit TXG290000, Stripper Subcategory facilities located east of the 98th meridian whose produced water is derived from the Carrizo/Wilcox, Reklaw or Bartosh formations in Texas and whose produced water does not exceed 3000 mg/l Total Dissolved Solids may discharge produced water subject to effluent limitations on oil and grease of 25

mg/l monthly average and 35 mg/l daily maximum. TXG290000 prohibits the discharge of produced sand derived from those facilities. Produced water derived from Stripper Subcategory and Offshore Subcategory wells which discharge to the main deltaic passes of the Mississippi River or to the Atchafalaya River below Morgan City including Wax Lake Outlet are not covered by Permit No. LAG290000, but may be regulated in future NPDES permitting actions. Permittees include commercial disposal facilities as well as oil and gas operators generating produced water and sand.

Region 6 is also issuing an administrative order requiring permittees discharging produced water from existing Coastal, Stripper or Offshore Subcategory wells which must meet the No Discharge requirement for produced water to meet that requirement no later than January 1, 1997, unless an earlier compliance date is required by the State.

DATES: These permits will become effective on February 8, 1995.

ADDRESSES: Notifications required by these permits should be sent to the Water Management Division, Enforcement Branch (6W-EA), EPA Region 6, P. O. Box 50625, Dallas, Texas 75202.

FOR FURTHER INFORMATION: Contact Ms. Ellen Caldwell, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202; telephone: (214) 665-7513.

SUPPLEMENTARY INFORMATION: EPA issues these general permits pursuant to its authority under Section 402 of the Clean Water Act, 33 U.S.C.

1342. These permits cover discharges of produced water and produced sand derived from Oil and Gas Point Source Category Facilities to coastal waters of Louisiana and Texas. Discharges regulated by these permits include those from Coastal Subcategory (40 CFR part 435, subpart D) facilities in Louisiana and Texas, discharges from the Stripper Subcategory (40 CFR part 435, subpart F) that discharge to coastal waters of Louisiana and Texas, and discharges from some Offshore Subcategory (40 CFR part 435, subpart A) to coastal waters of Louisiana and Texas. These permits do not authorize discharges from "new sources" as defined in 40 CFR 122.2.

Public notice of the draft permits was published in the **Federal Register** on December 22, 1992 (57 FR 60926) and in the Houston Post and New Orleans Times Picayune on January 9 1993. As then announced, the comment period was to close on February 9, 1993, but Region 6 subsequently extended it to March 15, 1993, because of numerous telephone and written requests for additional time. (57 FR 6968, February 3, 1993). Region 6 considered all comments it received in formulating the final permits. The Region has prepared a detailed Response to Comments, but is not publishing it in this **Federal Register** notice for practical reasons. A copy may be obtained from Ms. Caldwell at the address supplied above.

EPA Region 6 made a number of changes to the permits as a result of comments. Under Permit No. TXG290000, facilities in the Stripper Subcategory located east of the 98th meridian whose produced water comes from the Carrizo/Wilcox, Reklaw or Bartosh formations in

Texas and show produced water does not exceed 3000 mg/l Total Dissolved Solids are allowed to discharge produced water subject to an effluent limitation of 3000 mg/l for Total Dissolved Solids and oil and grease limits of 25 mg/l monthly average and 35 mg/l daily maximum. Associated changes to the wording of Part 1.A and Part II of the permits reflect these produced water discharge authorization: e.g. notices of intent to be covered and Discharge Monitoring Reports are now required for facilities allowed to discharge. In response to comments on potential ambiguities, clarifying wording changes and additions are also included in the final permits. Produced water discharges derived from Stripper subcategory and Offshore Subcategory wells into the main deltaic passes of the Mississippi River, or to the Atchafalaya River below Morgan City including Wax Lake Outlet, have been excluded from coverage under Permit No. LAG290000 and may be the subject of future regulatory actions. These changes are discussed in greater detail in the written Response to Comments.

The Region is also issuing an administrative order requiring permittees discharging produced water from existing Coastal, Stripper or Offshore Subcategory wells which must meet the No Discharge requirement for produced water, to comply with that requirement no later than January 1, 1997, unless an earlier compliance date is required by the State. Many discharges in Louisiana are required to cease sooner than January 1, 1997. As explained in the Fact Sheet for the Draft Permits, Region 6 was not required to publish its proposed administrative order nor is the final order subject to judicial review before its enforcement. Region 6 nevertheless solicited comments on a draft order and responses proved helpful in formulating the final order.

Other Legal Requirements

A. State Certification

Under Section 401(a)(1) of the Act, EPA may not issue a NPDES permit until the State in which the discharge will occur grants or waives certification to ensure compliance with appropriate requirements of the Act and State law. The State of Louisiana, after review of the permit, has certified that the Louisiana permit will comply with applicable state water quality standards or limitations. The State of Texas has waived certification.

B. The Endangered Species Act

The Endangered Species Act (ESA), 16 USC 1536, requires Federal agencies to insure that their actions, such as permit issuance, are unlikely to jeopardize the continued existence of any listed endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. In informal consultation under ESA Section 7(a)(2), the U. S. Fish and Wildlife Service has concurred with EPA's determination that issuance of these permits is unlikely to adversely affect any federally listed species or designated critical habitats.

C. The Coastal Zone Management Act

In accordance with Section 307(c)(3) of the Costal Zone Management Act, the Louisiana Coastal Zone Management Division of Louisiana Department of Natural Resources has reviewed NPDES permit LAG290000 and found its issuance consistent with the Louisiana Coastal Zone Management Program.

D. The Paperwork Act

The information collection requirements of these general permits have been approved by OMB under provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et. seq. in prior submissions made for the NPDES permit program.

E. Regulatory Flexibility Act

The Regulatory Flexibility Act requires that federal agencies prepare a regulatory flexibility analysis for regulations that will have a significant impact on a substantial number of small entities. The impact on small entities was discussed in some detail in the Fact Sheet (57 FR 60943) for the current permits. Because certain groups of wells are now allowed by these final permits to discharge produced water and, for the Louisiana permit, compliance with produced water No Discharge limits will in many cases be required by State regulations sooner than required by this permit, the impact on small entities will be even less than anticipated for the proposed permits.

NPDES Permits LAG290000 and TXG290000 are hereby issued. In addition, the General Administrative Order which applied to those permits is hereby issued and appears following NPDES Permits LAG290000 and TXG290000.

Signed this 22nd day of December, 1994. Myron O. Knudson, Director, Water Management Division, EPA, Region 6.

In Compliance with the provisions of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq; the "Act"), these permits prohibit the Discharge of produced water and produced sand derived from Oil and Gas Point Source Category facilities to "coastal" waters of Louisiana and Texas, as described below, in accordance with effluent limitations and other conditions set forth in Parts I and II. Facilities covered by these permits include those in the Coastal Subcategory (40 CFR part 435, subpart D), the Stripper Subcategory (40 CFR part 435, subpart F) that discharge to "coastal" waters of Louisiana and Texas, and the Offshore Subcategory (40 CFR part 435, subpart A) which discharge to "coastal" water of Louisiana and Texas.

These permits do not apply to "new sources" as defined in 40 CFR 122.2.

These permits, except for certain portions listed in Part I.B, shall become effective February 8 1995, and expire at midnight on February 8, 2000.

Part I

Section A. General Permit Coverage and Notification Requirements

1. Operations Covered

a. Facilities in the Coastal Subcategory (40 CFR part 435, subpart D) located in Louisiana and Texas. Location of a Coastal

Subcategory facility is determined by the location of the wellhead associated with that facility.

b. Facilities in the Offshore Subcategory (40 CFR part 435, subpart A) and the Stripper Subcategory (40 CFR part 435, subpart F) which discharge to "coastal" waters of Louisiana or Texas. Note that Facilities in the Stripper Subcategory and the Offshore Subcategory that discharge directly to a major deltaic pass of the Mississippi River or to the Atchafalaya River, including Wax Lake Outlet, below Morgan City are not covered by Permit No. LAG290000.

c. Facilities which dispose of produced water or produced sand derived from Coastal subcategory facilities located in Louisiana or Texas.

d. Facilities which dispose of produced water or produced sand derived from Stripper or Offshore Subcategory facilities by Discharge to coastal waters of Louisiana or Texas.

2. Permittees Covered

Operators of Facilities listed in Part I.A.1 of these permits

3. Notification Requirements

a. Operators of facilities whose Discharge of produced water and produced sand is prohibited by these permits are automatically covered; a written notification of intent to be covered by these permits is not required.

b. Operators of facilities whose produced water discharge is allowed (See Part I.B.2.a. of these permits) are required to submit a written notification of intent to be covered by these permits.

Written notification of intent to be covered, including the legal name and address of the operator, the lease (or lease block) number assigned by the Railroad Commission of Texas or, if none, the name commonly assigned to the lease area, the type of facilities located within the lease (or lease block), the name of the formation form which the produced water originates and the Total Dissolved Solids concentration of the produce water shall be submitted:

(1) For existing discharges of produced water, within 45 days of the effective date of this permit.

(2) For new discharges of produced water, within fourteen days prior to the commencement of discharge.

c. Because these permits cover only produced water and produced sand, discharges of other waste waters from Coastal Subcategory wells must apply to be covered by NPDES Permits LAG330000 or TXG330000, which cover the discharge of waste discharges, other than produced water and produced sand, from coastal subcategory production (and drilling) facilities.

4. Termination of Operations

Lease (or lease block) operators shall notify the regional Administrator within 60 days after the permanent termination of discharges from their facilities. In addition, lease (or lease block) operators shall notify the Regional Administrator within 30 days of any transfer of ownership.

Section B. Application for NPDES Individual Permit

1. Any operator authorized by this permit may request to be excluded from the coverage of this general permit by applying for an individual permit. The operator shall submit an application together with the reasons supporting the request to the Regional Administrator.

2. When an individual NPDES permit is issued to an operator otherwise subject to this general permit, the applicability of this permit to the owner or operator is automatically terminated on the effective date of the individual permit.

Section C. General Permit Limits

1. Permit conditions Applicable to LAG290000

a. Prohibitions

Permittees shall not discharge nor shall they cause or allow the discharge of produced water and produced sand. Operators of facilities generating pollutants regulated under this permit shall take reasonable positive steps to assure said pollutants are not unlawfully discharged to waters of the United States by third parties and shall maintain documentation of those steps for no less than three years.

b. Other Requirements

All dischargers must comply with any more stringent requirements contained in Louisiana

Water Quality Regulations, LAC:33,IX,7.708.

2. Permit conditions Applicable to TXG290000

a. Prohibitions

Permittees shall not discharge nor shall they cause or allow the discharge of produced water or produced sand. Operators of facilities generating pollutants regulated under this permit shall take reasonable positive steps to assure said pollutants are not unlawfully discharged to waters of the United States by third parties and shall maintain documentation of those steps for no less than three years.

Exception to prohibition on discharge of produced water: Facilities in the Striper Subcategory located east of the 98th meridian whose produced water comes from the Carrizo/Wilcox, Reklaw or Bartosh formations in Texas and whose produced water does not exceed 3000 mg/l Total Dissolved Solids shall meet the following limits and monitoring requirements:

(1) Produced water discharges must meet both a daily maximum of 35 mg/l and a monthly average of 25 mg/l for oil and grease.

(2) Monitoring for oil and grease shall be performed once per month. The sample type may be a grab, or a 24-hour composite consisting of the arithmetic average of the results of 4 grab samples taken over a 24-hour period.

(3) Produced water flow monitoring requirement: Once per month, an estimate of the flow in MGD (million gallons per day) must be made and recorded.

Part II

(Applicable to LAG290000 and TXG290000)

Section A. General Conditions

1. Introduction

In accordance with the provisions of 40 CFR 122.41 et. seq. this permit incorporates by reference ALL conditions and requirements applicable to NPDES permits set forth in the Clean Water Act, as amended (hereinafter known as the "Act") as well as all applicable EPA regulations.

2. Duty to Comply

The permittee must comply with all conditions of this permit. Any permit non-compliance constitutes a violation of the Clean Water Act and is grounds for enforcement action and/or for requiring a permittee to apply for and obtain an individual NPDES permit.

3. Permit Flexibility

This permit may be modified, revoked and reissued, or terminated for cause, in accordance with 40 CFR 122.62-122.64. The filing for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

4. Property Rights

This permit does not convey any property rights of any sort, or any exclusive privileges nor does it authorize any injury to private property or any invasion of personal rights, or any infringement of Federal, State of local laws or regulations.

5. Duty to Provide Information

The permittee shall furnish to the Regional Administrator, within a reasonable time, any information which the Regional Administrator may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The permittee shall also furnish the Regional Administrator, upon request, copies of records required to be kept by this permit.

6. Criminal and Civil Liability

Except as provided in permit conditions on "Bypassing" and "Upsets", nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance. Any false or materially misleading representation or concealment of information required to be reported by the provisions of the permit, the Act or applicable CFR regulations which avoids or effectively defeats the regulatory purpose of the Permit may subject the permittee to criminal enforcement pursuant to 18 USC Section 1001.

7. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee may be subject under Section 311 of the Clean Water Act.

8. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Clean Water Act.

9. Severability

The provisions of this permit are severable, and if any provision of this permit or the application of any provision of this permit to any circumstance is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

Section B. Proper Operation and Maintenance

1. Need to Halt or Reduce Not a Defense

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in Order to maintain compliance with the conditions of this permit.

2. Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.

3. Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed and used by the permittee to achieve compliance with the conditions of this permit. This provision requires the operation of backup or auxiliary facilities of similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

4. Bypass of Facilities

a. Definitions

(1) "Bypass" means the intentional diversion of waste streams from any portion of a facility.

(2) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities that causes them to be inoperable, or substantial and permanent loss of natural resources than can reasonably be expected to occur in the absence of bypass. Severe property damage does not mean economic loss caused by delays in production.

b. Notice

(1) Anticipated bypass. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten days before the date of the bypass.

(2) Unanticipated bypass. The permittee shall, within 24 hours, submit notice of an unanticipated bypass as required in Part II.D.2.

c. Prohibition of Bypass

(1) Bypass is prohibited, and the Regional Administrator may take enforcement

action against a permittee for bypass, unless:

(a) Bypass was unavoidable to prevent loss of life, personal injury or severe property damage;

(b) There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back-up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass which occurred during normal periods of equipment downtime or preventive maintenance; and

(c) The permittee submitted notices as required by Part II.B.4.b.

(2) The Regional Administrator may approve an anticipated bypass, after considering its adverse effects, if the Regional Administrator determines that it will meet the conditions listed at Part II.B.4.c.(1).

5. Upset Conditions

a. Definition

"Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed facilities, inadequate facilities, lack of preventive maintenance, or careless or improper operation.

b. Effects of an Upset

An upset constitutes an affirmative defense of an action brought for noncompliance with such technology-based permit effluent limitations if the requirements of Part II.B.5.c. are met. No determination made during administrative review of claims that noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review.

c. Conditions necessary for a demonstration of upset.

The permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed contemporaneous logs, or other relevant evidence that:

(1) An upset occurred and that the permittee can identify the cause(s) of the upset;

(2) The permitted facility was at the time being property operated;

(3) The permittee submitted notice of the upset as required by Part II.D.2; and

(4) The permittee complied with Part II.B.2.

d. Burden of Proof

In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

6. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed in the course of treatment of control of waste waters shall be disposed of in a manner such as to prevent any pollution from such materials from entering waters of the United States.

Section C. Monitoring and Records

1. Inspection and Entry

The permittee shall allow the Regional Administrator or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

(a) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;

(b) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;

(c) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and

(d) Sample or monitor at reasonable times, for the purpose of assuring permit compliance or as otherwise authorized by the Clean Water Act, any substances or parameters at any location.

2. Representative Sampling

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge.

3. Retention of Records

The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, and copies of all reports required by this permit, for a period of at least 3 years from the date of the sampling, measurement, or reporting. This period may be extended by request of the Regional Administrator at any time.

The operator shall maintain records at development and production facilities for 3 years, wherever practicable and at a specific shore-based site whenever not practicable. The operator is responsible for maintaining records at exploratory facilities while they are discharging under the operator's control and at a specified shore-based site for the remainder of the 3-year retention period.

4. Record Contents

Records of monitoring information shall include:

(a) The date, exact place, and time of sampling or measurements.

(b) The individual(s) who performed the sampling or measurements.

(c) The date(s) analyses were performed.

(d) The individual(s) who performed the analyses.

(e) The analytical techniques or methods used, and

(f) The results of such analyses.

5. Monitoring Procedures

Monitoring must be conducted according to test procedures approved under 40 CFR Part 136, unless other test procedures have been specified in this permit.

6. Discharge Rate/Flow Measurements

Appropriate flow measurement devices consistent with accepted practices shall be selected, maintained, and used to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to insure that the accuracy of the measurements are consistent with the accepted capability of that type of device. Devices selected shall be capable of measuring flows with a maximum deviation of less than ±10% from true discharge rates throughout the range of expected discharge volumes.

Section D. Reporting Requirements

1. Anticipated Noncompliance

The permittee shall give advance notice to the Regional Administrator of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

2. Discharge Monitoring Reports

For facilities which are allowed to discharge and for which monitoring is required by Part I of these permits, the operator of each lease (or lease block) shall be responsible for submitting monitoring results for all facilities within that area (i.e. lease or lease block). The monitoring results for the facilities within the particular lease (or lease block) shall be summarized on the annual Discharge Monitoring Report for that lease (or lease block).

Monitoring results obtained during the

previous 12 months shall be summarized and reported on a Discharge Monitoring Report (DMR) Form (EPA No. 3320-1). The highest monthly average for all activity within each lease (or lease block) shall be reported. The highest daily maximum sample taken during the reporting period shall be reported as the daily maximum concentration. (See "Definitions" for more detailed explanations of these terms).

If any category of waste (discharge) is not applicable for all facilities within the lease (or lease block) due to the type of operation (e.g. drilling, production), "no discharge" must be recorded for those categories on the DMR. If all facilities within a lease block have had no activity during the reporting period, then "no activity" must be written on the DMR. All pages of the DMR must be signed and certified as required by Part II.D.9 of these permits and submitted when due.

The Permittee must complete all empty blanks in the DMR unless there has been absolutely no activity or no discharge within the lease (or lease block) for the entire reporting period. In these cases, EPA Region VI will accept a listing of leases or lease blocks with no discharges or no activity, in lieu of submitting actual DMR's for these areas. This listing must specify the permittee's NPDES General Permit Number, lease or lease block description, and EPA assigned outfall number. The listing must also include the certification statement presented in Part II.D.9 of these permits and an original signature of the designated responsible official.

Upon receipt of a notification of intent to be covered (see Part I.A.2 of these permits for facilities requiring such notification), the permittee will be notified of its specific outfall number applicable to that lease (or lease block) and will be informed of the discharge monitoring report due date.

All notices and reports required under this permit shall be sent to EPA Region 6 at the address below:

Director, Water Management Division
USEPA, Region 6, Enforcement Branch
(6W-EA), P. O. Box 50625, Dallas, TX
75270

3. Additional Monitoring by the Permittee

If the permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 CFR Part 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR. Such increased monitoring frequency shall also be indicted on the DMR.

4. Averaging of Measurements

Calculations for all limitations which require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Regional Administrator in the permit.

5. Twenty-four Hour Reporting

a. For facilities which are allowed to discharge produced water by Part I.B.2.a of Permit No.TXG290000, the permittee shall report any noncompliance which may endanger health or the environment (including any spill that requires oral reporting to the state regulatory authority). Information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue, and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. The Regional Administrator may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

The following shall be included as information which must be reported within 24 hours:

(1) Any anticipated bypass which exceeds any effluent limitation in the permit;

(2) Any upset which exceeds any effluent limitation in the permit;

(3) Violations of a maximum daily discharge limitation or daily minimum toxicity limitation for any of the pollutants listed by the Regional Administrator in Part III of the permit to be reported within 24 hours.

The reports should be made to Region 6 by telephone at (214) 665-6593. The Regional Administrator may waive the written report on a case-by-case basis if the oral report has been received within 24 hours.

b. For all facilities prohibited from discharging produced water, the permittee shall report any noncompliance with these permits, bypass or upset. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or plans to reduce, eliminate, and prevent reoccurrence of the noncompliance. The 24 hour oral reporting and follow up written submission requirement in Part II.D.5.b of these permits shall become effective 60 days after the effective date of these permits.

6. Other Noncompliance

For facilities which are allowed to discharge by Part I.B.2.a. of Permit No. TXG290000, the permittee shall report all instances of noncompliance not reported under Part II, Section D, paragraphs 2 and 5 at the time monitoring reports are submitted. The reports shall contain the information listed in Section D, paragraph 5.

7. Other Information

Where the permittee becomes aware that it failed to submit any relevant facts in any report to the Regional Administrator, it shall promptly submit such facts or information.

8. Changes in Discharges of Toxic Substances

The permittee shall notify the Regional Administrator as soon as it knows or has reason to believe:

a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, or any toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the "notification levels" described in 40 CFR 122.42(a)(1).

b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant which is not limited in the permit, if that discharge will exceed the highest of the "notification levels" described in 40 CFR 122.42(a)(2).

9. Signatory Requirements

All reports, or information submitted to the Regional Administrator shall be signed and certified as follows:

a. For a corporation. By a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

(1) A president, secretary, treasurer, or vice-president of the corporation in charge of a principal business function or decision making functions for the corporation, or

(2) The manager of one or more manufacturing, production or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

b. For a partnership or sole proprietorship. By a general partner of the proprietor, respectively.

c. For a municipality, State, Federal or other public agency. Either a principle executive officer or ranking elected official. For purposes of this section, a principle executive officer of a Federal agency includes:

(1) the chief executive officer of the agency, or

(2) A senior executive officer having responsibility for the overall operations of a principle geographic unit of the agency.

d. Alternatively, all reports required by the permit and other information requested by the Regional Administrator may be signed by a person described above or by a duly authorized representative only if:

(1) the authorization is made in writing by a person described above;

(2) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or oil field, superintendent, or position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either an individual or an individual occupying a named position; and

(3) the written authorization is submitted to the Regional Administrator.

e. Certification. Any person signing a document under this section shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for the gathering of the information, the information submitted is, to the best of my knowledge and belief true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

10. Availability of Reports

Except for applications, effluent data, and other data specified in 40 CFR 122.7, any information submitted pursuant to this permit may be claimed confidential by the submitter. If no claim is made at the time of submission, information may be made available to the public without further notice.

Section E. Penalties for Violations of Permit Conditions

1. Criminal

a. Negligent Violations

The Act provides that any person who negligently violates permit conditions implementing Sections 301, 302, 306, 307 or 308 of the Act is subject to a fine of not less than $2500 nor more than $25,000 per day of violation, or by imprisonment for not more than

1 year, or both.

b. Knowing Violations

The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307 or 308 of the Act is subject to a fine of not less than $5,000 per day of violation nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or both.

c. Knowing Endangerment

The Act provides that any person who knowingly violates permit conditions implementing Sections 301, 302, 306, 307 or 308 of the Act and who knows at the time that he is placing another person in imminent danger of death or serious bodily injury is subject to a fine of not more than $250,000, or by imprisonment for not more than 15 years, or both.

d. False Statements

The Act provides that any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act or who knowingly falsifies, tampers with, or renders inaccurate, any monitoring device or method required to be maintained under the Act, shall upon conviction, be punished by a fine of not more than $10,000 per day, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such a person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both (See Section 309(c)(4) of the Clean Water Act).

2. Civil Penalties

The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307 or 308 of the Act is subject to a civil penalty not to exceed $25,000 per day for each violation.

3. Administrative Penalties

The Act provides that any person who violates a permit condition implementing Sections 301, 302, 306, 307, 308, 318, or 405 of the Act is subject to a civil penalty not to exceed $25,000 per day for each violation.

a. Class I Penalty

Not to exceed $10,000 per violation nor shall the maximum amount exceed $25,000.

b. Class II Penalty

Not to exceed $10,000 per day for each day during which the violations continues nor shall the maximum amount exceed $125,000.

Section F. Definitions

All definitions in Section 502 of the Act shall apply to this permit and are incorporated herein by reference. Unless otherwise specified in this permit, additional definitions words or phrases used in this permit are as follows:

1. *Act* means the Clean Water Act (33 U.S.C. 1251 et.seq.) as amended.

2. *Applicable effluent standards and limitations* means all state and Federal effluent standards and limitations to which a discharge is subject under the Act, including, but not limited to, effluent limitations, standards of performance, toxic effluent standards and prohibitions, and pretreatment standards.

3. *Applicable water quality standards* means all water quality standards to which a discharge is subject under the Act and which have been (a) approved or permitted to remain in effect by the Administrator following submission to him/her, pursuant to Section 303(a) of the Act, or (b) promulgated by the Administrator pursuant to Section 303(b) or 303(c) of the Act.

4. *Bypass* means the intentional diversion of waste streams from any portion of a treatment facility.

5. *Coastal waters* are defined as waters of the United States (as defined at 40 CFR 122.2) located landward of the territorial seas.

6. *Daily Discharge* means the discharge of a pollutant measured during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limits expressed in units of measurement other than mass, the "daily discharge" is calculated as the average measurement of the pollutant over the sampling day. "Daily discharge" determination of

concentration made using a composite sample shall be the concentration of the composite sample. When grab samples are used, the "daily discharge" determination of concentration shall be arithmetic average (weighted by flow value) of all samples collected during that sampling day.

7. *Daily Maximum discharge limitation* means the highest allowable "daily discharge" during the calendar month.

8. *Environmental Protection Agency* means the U.S. Environmental Protection Agency.

9. *Monthly Average* (also known as daily average) discharge limitations means the highest allowable average of "daily discharge(s)" measured during a calendar month divided by the number of "daily discharge(s)" during that month. When the permit establishes monthly average concentration effluent limitations or conditions, the monthly average concentration means the arithmetic average (weighted by flow) of all "daily discharge(s)" of concentration determined during the calendar month.

10. *National Pollutant Discharge Elimination System* means the national program for issuing, revoking and reissuing, terminating, monitoring and enforcing permits, and imposing and enforcing pretreatment requirements under Sections 307, 318, 402 and 405 of the Act.

11. *Produced sand* means sand and other particulate matter from the producing formation and production piping (including corrosion products), as well as source sand and hydrofrac sand. Produced sand also includes sludges generated by any chemical polymer used in a

produced water treatment system.

12. *Produced water* means water (brine) brought up from the hydrocarbon-bearing strata during the extraction of oil and gas, and can include formation water, injection water, and any chemicals added from hole or during the oil/water separation process.

13. *Regional Administrator* means the Administrator of the U.S. Environment Protection Agency, Region 6.

14. *Severe property damage* means substantial physical damage to property, damage to treatment facilities which causes them to become inoperable, or substantial and permanent loss of natural resources which can reasonably be expected to occur in the absence of bypass. Severe property damage does not mean economic loss caused by delays in production.

15. *Territorial seas* refers to "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles."

16. *Upset* means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

Section C. Monitoring and Records

United States Environmental Protection Agency, Region 6, In Re: NPDES Permit Nos. LAG290000 and TXG290000, General Administrative Compliance Order

The following Findings are made and Order issued pursuant to the authority vested in the Administrator of the Environmental protection Agency (EPA) by Section 309(a)(3) of the Clean Water Act (hereinafter "the Act"), 33 U.S.C. 1319(a)(3), and duly delegated to the Regional Administrator, Region 6, and duly redelegated to the undersigned Director, Water Management Division, Region 6. Failure to comply with the interim requirements established in this Order constitutes a violation of this Order and the NPDES permits.

Findings

I

The term "waters of the United States" is defined at 40 C.F.R. 122.2. The term "coastal" is defined in NPDES Permits LAG290000 and TXG290000 and includes facilities which would be considered "Onshore" but for the decision in *API v. EPA*, 661 F.2 340(5th Cir. 1981). The term "existing" means spudded prior to the effective date of NPDES Permits LAG290000 and TXG290000.

II

Pursuant to the authority of Section 402(a)(1) of the Act, 33 U.S.C. §1342, Region 6 issued National Pollutant Discharge Elimination System (NPDES) Permits No. LAG290000 and TXG290000 with an effective date of February 8, 1995. These permits prohibit the discharge of produced water and produced sand derived from Oil and Gas Point Source Category facilities to "coastal" waters of Louisiana and Texas in accordance with effluent limitations and other conditions set forth in Parts I and II of these permits. Facilities covered by these permits include those in the Coastal Subcategory (40 CFR 435, Subpart D), the Stripper Subcategory (40 CFR 435, Subpart F) that discharge to "coastal" waters of Louisiana and Texas, and the Offshore Subcategory (40 CFR 435, Subpart A) which discharge to "coastal" waters of Louisiana and Texas.

III

Respondents herein are permittees subject to General NPDES Permit Nos. LAG290000 and/or TXG290000 and who:

A. Discharge produced water derived from an existing Coastal, Stripper or Offshore Subcategory well or wells to "coastal" waters of Texas or Louisiana on the effective date of LAG290000 or TXG290000.

B. Discharge produced water derived from an existing Coastal Subcategory well or wells located in Louisiana or Texas to waters of the United States outside Louisiana or Texas "coastal" waters on the effective date of LAG290000 or TXG290000.

C. Are required by Permits No. LAG290000 or TXG290000 to meet the requirement of No Discharge of produced water and are taking affirmative steps to meet that requirement.

D. Have submitted an "Administrative Order Notice". Such Notices shall be sent to:

Enforcement Branch (6W-EA), Region 6, U. S. Environmental protection Agency, P. O. Box 50625, Dallas, TX 75270. Upon submission of such an Administrative Order Notice, a permittee shall be a Respondent under this General Administrative Order. The terms of each Administrative Order Notice submitted shall be considered terms of this Order and shall be enforceable against the Respondent submitting the Administrative Order Notice. Each Administrative Order Notice must include:

1. Identification of the facility by name and its location (by lease, lease block, field or prospect name), the name and address of its operator, and the name, address and telephone number of a contact person.

2. A certification signed by a person meeting the requirements of Part II, Section D.9 (Signatory Requirements) of Permits LAG290000 and TXG290000 stating that a Compliance Plan has been prepared for the facility in accordance with this Order. A copy of this plan shall not be included with the Administrative Order Notice, but shall be made available to EPA upon request.

3. A Compliance Plan shall include a description of the measures to be taken, along with a schedule to cease discharge of produced water to waters of the United Sates as expeditiously as possible.

IV

To maintain oil and gas production and comply with the permits' prohibition on the discharge of produced water, a significant number of Respondents will have to reinject their produced water. A lack of access to the finite number of existing Class II disposal wells, state UIC permit writers, and drilling contractors may cause noncompliance for a significant number of Respondents. In addition, time will be required for some Respondents to reroute produced water collection lines to transport the produced water to injection wells.

V

Respondents may reasonably perform all actions necessary to cease their Discharges of produced water no later than January 1, 1997.

Order

Based on the foregoing Findings, it is Ordered that Respondents:

A. fully comply with all conditions of NPDES Permits No. LAG290000 and TXG290000 except for the prohibition on the discharge of produced water and except for the requirement that all discharges of produced water be reported within twenty-four hours.

B. Complete all activities necessary to attain full and continuance compliance with NPDES Permits No. LAG290000 and TXG290000 as soon as possible, but in no case later than January 1, 1997.

C. Operate and maintain all existing pollution control equipment, including existing oil/water separation equipment, in such a manner as to minimize the discharge of pollutants contained in produced water at all times until such time as respondents cease their discharges of produced water.

D. Submit notice to the Water Enforcement

Branch of EPA Region 6 when produced water discharges subject to this Order have ceased.

E. Subject to NPDES Permit LAG290000 comply at all times with Part I, Section B.1.b. of said permit, requiring that Respondents meet any more stringent requirements contained in Louisiana Water Quality Regulation LAC:33,IX.7.708.

Nothing herein shall preclude additional enforcement action.

The effective date of this Order shall be the effective date of NPDES Permits No. LAG290000 and TXG290000.

[FR Doc. 95-416 Filed 1-6-95: 8:45 am]

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SIERRA CLUB, LONE STAR CHAPTER
Plaintiff,
v.
CIVIL ACTION
NO. H-93-1147

CEDAR POINT OIL COMPANY,
Defendant.

AFFIDAVIT OF TOMMY C. DOUGLAS

I, Tommy C. Douglas, certify that I have personal knowledge of the facts stated herein and that the following statements are true and correct.

1. My name is Tommy C. Douglas. I am more than 21 years of age, of sound mind, and in all ways qualified to make this affidavit.

2. My address is 201 Emerson, Apt. 20, Houston, Texas 77006.

3. I have been a member of the Lone Star Chapter of the Sierra Club for approximately 15 years. I am a member of the Sierra Club Houston Group, which is part of the Lone Star Chapter of the Sierra Club. I currently serve as the Secretary of the Executive Committee of the Houston Group.

4. The Sierra Club Houston Group sponsors a number of activities, including environmental education and awareness, environmental advocacy, and outdoor trips. Many of these activities focus on and take place on and around Galveston Bay.

5. I actively use and enjoy Galveston

Bay. One of my main activities on the Bay is canoeing. Approximately ten times per year, I canoe on the Bay, in marshes along the Bay, and on tributaries of the Bay. During these canoe trips I birdwatch, observe other wildlife, and learn about the Bay ecosystem. I have led trips on Galveston Bay for the purpose of educating other persons.

6. In the spring of 1993, I participated in an environmental education boat trip during which we explored the area around the mouth of Cedar Bayou. It is my understanding that this location is approximately two to three miles from the produced water discharge point of Cedar Point Oil Company.

7. During the 1991-1992 period, I participated in a cordgrass transplanting project, during which we obtained cordgrass cores at a natural cordgrass bed at the north end of Atkinson Island. It is my understanding that this location is approximately 4-6 miles from the produced water discharge point of Cedar Point Oil Company.

8. I intend in the future to continue to enjoy Galveston Bay for the types of activities described above, including activities in the area of Cedar Bayou and Houston Point.

9. The activities in which I participate on Galveston Bay, and my enjoyment of the Bay, are dependent on good water quality.

10. I am concerned that polluted water injures the ecosystem of the Bay and reduces its value as habitat for birds and aquatic animals and plants.

11. I am familiar with "produced water" that is being discharged into Galveston Bay by oil and gas production facilities located on

the Bay. I am concerned that the discharge of produced water adversely affects the water quality and the wildlife of the Bay. Therefore, I am concerned that the continued discharge of produced water will impair my ability to enjoy the activities in which I participate.

DATED: July 20, 1993.

/s/____________________
TOMMY C. DOUGLAS

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority on this 20th day of July, 1993.

/s/____________________
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

(SEAL)

Mary W. Carter
Printed name of notary
My commission expires:
11/3/94

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SIERRA CLUB, LONE STAR CHAPTER
Plaintiff,
v.
CIVIL ACTION
NO. H-93-1147
CEDAR POINT OIL COMPANY,
Defendant.

AFFIDAVIT OF MARK MUHICH

I, Mark Muhich, certify that I have personal knowledge of the facts stated herein and that the following statements are true and correct.

1. My name is Mark Muhich. I am more than 21 years of age, of sound mind, and in all ways qualified to make this affidavit.

2. My address is 2808 Strand, Galveston, Texas 77550. I have lived at that address for approximately nine years. My house is one block from Galveston Bay.

3. I have been a member of the Lone Star Chapter of the Sierra Club for five years. For the last two years, I have served as the Chair of the Sierra Club Galveston Regional Group, which is part of the Lone Star Chapter of the Sierra Club. The geographic range of the Galveston Regional Group includes Galveston Bay. The Galveston Group contains about 150-200 Sierra Club members.

4. The Sierra Club Galveston Regional Group sponsors a number of activities, including environmental education and

awareness, environmental advocacy, and outdoor trips such as bird watching and wildlife observation. Many of these activities focus on and take place on and around Galveston Bay.

5. I actively participate in birdwatching at many locations around Galveston Bay. I go birdwatching on and around Galveston Bay approximately 20 times per year. I have gone birdwatching approximately 200 times during the period that I have lived in Galveston. In addition to the birdwatching, I enjoy seeing other types of wildlife in many areas around Galveston Bay.

6. The activities in which I participate on Galveston Bay are dependent on good water quality.

7. During the course of my birdwatching trips, I have occasion to observe the water quality of the Bay. On a number of occasions, I have observed polluted water in the form of discolored water, the presence of oil and grease, and unpleasant odors.

8. The polluted water of Galveston Bay impairs my enjoyment of birdwatching and observing other wildlife on and around the Bay. In addition, I am concerned that the polluted water injures the quality of the Bay and its environs as habitat for birds.

9. I would enjoy birdwatching and seeing other wildlife on and around Galveston Bay more if the water quality were not degraded.

10. I am familiar with "produced water" that is being discharged into Galveston Bay by oil and gas production facilities located on the Bay. I am concerned that the discharge of produced water adversely affects the water quality and the wildlife of the Bay.

Therefore, I am concerned that the continued discharge of produced water will impair my ability to enjoy the activities in which I participate.

DATED: 7/19, 1993.

/s/______________________
MARK MUHICH

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority on this 19th day of July, 1993.

/s/______________________
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

(SEAL)

Sheryl L. Caldwell
Printed name of notary
My commission expires:
7/9/97

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SIERRA CLUB, LONE STAR CHAPTER
Plaintiff,
v.
CIVIL ACTION
NO. H-93-1147
CEDAR POINT OIL COMPANY,
Defendant.

AFFIDAVIT OF JOHN SOMERS

I, John Somers, certify that I have personal knowledge of the facts stated herein and that the following statements are true and correct.

1. My name is John Somers. I am more than 21 years of age, of sound mind, and in all ways qualified to make this affidavit.

2. My address is 1416 Sealy Avenue, Galveston, Texas. I have lived at that location for almost two years. My house is one-half mile from Galveston Bay.

3. I have been a member of the Lone Star Chapter of the Sierra Club for almost two years. I currently serve as the Conservation Chair of the Sierra Club Galveston Regional Group, part of the Lone Star Chapter of the Sierra Club. The geographic range of the Galveston Regional Group includes Galveston Bay. As Conservation Chair, I am chairman of the local Conservation Committee, which organizes and monitors the Sierra Club's response to conservation and environmental issues in the area.

4. During the almost two years that I have lived in the Galveston area, I have used and enjoyed Galveston Bay in a number of ways, primarily through birdwatching, but also through boating and swimming. I have been birdwatching on and around Galveston Bay approximately 40 times during that period, and I have been boating on and swimming in Galveston Bay an additional five or eight times. In addition to the activities listed above, I enjoy seeing wildlife on and around Galveston Bay.

5. During my activities on and around Galveston Bay, I have observed birds swimming and wading in the water. I also have observed shore birds eating fish, other aquatic animals, and aquatic plants from the water of Galveston Bay.

6. The activities in which I participate on Galveston Bay are dependent on good water quality.

7. I am familiar with "produced water" that is being discharged into Galveston Bay by oil and gas production facilities located on the Bay. I am concerned that the discharge of produced water adversely affects the water quality and the wildlife of the Bay. Therefore, I am concerned that the continued discharge of produced water will impair my ability to enjoy the activities in which I participate.

DATED: 19 July, 1993.

/s/____________________

JOHN SOMERS

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority on this 19th day of July, 1993.

/s/____________________
NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS

(SEAL)

Gloria A. Revilla
Printed name of notary
My commission expires:
11-19-95